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Defamation, privacy & the ‘chill’

*A socio-legal study of the relationship between
media law and journalistic practice
in England and Wales, 2008-13*

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A thesis submitted for the degree of Doctor of Philosophy

School of Arts and Social Sciences

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Acknowledgements

In autumn 2014, as I was putting the finishing touches to this thesis, I was in touch with a journalist who had received a threat of legal action, and was feeling unsure about his position. 'It's when things like this happen, it reminds you that the chilling effect is actually real. You can't help but have it in your mind when stories connected to that person comes up,' he remarked. It reminded me of why I started the research in the first place, to try and document experiences like these and make sense of the many different ways in which the chilling effect is (or isn't) perceived. Without the goodwill and enthusiasm of journalists and bloggers who filled in lengthy surveys, media specialist lawyers who agreed to be interviewed, and friends and colleagues who shared their advice and ideas, it could not have been done.

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Declaration

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Abstract

A popular metaphor used by judges and journalists, the 'chilling effect' is used to describe the undesirable deterrence of legitimate free expression, although it is widely and loosely interpreted and rarely interrogated through methodical empirical research. This research examines the perceived chilling effect on freedom of expression in relation to defamation and privacy law and digital journalistic practice in England and Wales, over a five year period (2008-13). It examines media law in practice through interviews with legal specialists in defamation and privacy, close monitoring of online content, examination of court and policy documents, and surveys among journalists and online writers, and considers how decisions to publish or abandon stories are made in the contemporary networked news environment.

The thesis finds that lawyers play an under-recognised but pivotal social role in the editorial gatekeeping process, enabling as well as restricting publication. Their absence in ill-resourced environments has a paradoxically constraining and liberating effect: a lack of legal advice and knowledge may lead to unnecessary censorship of particular stories, but at the same time small-scale operations without legal support and training may be less reactive to potential libel and privacy risks. Despite a popular perception of runaway privacy law, the findings indicate that libel was still a predominant concern for research participants and generated more threats and claims.

The impact of defamation and privacy law on journalism, which is implied by the chilling effect metaphor, cannot be understood in isolation and a socio-legal approach based on empirical evidence is required to more fully expose the two-way interaction between law and journalism. Editorial decisions are subject to a complex web of competing factors; the collective or individual avoidance of stories can only be explained by looking at legal influences in their social context. In this way, hyperlocal bloggers may steer clear of particular topics for fear of social implications in local communities and national journalists can neglect stories as a result of organisational commercial pressures, or because such stories would damage their access to sources.

The chilling effect descriptor is generally used to help direct policy and decisions that enhance freedom of expression in the public interest but debate is severely hampered by the lack of systematic research and data collection, as this thesis will show. Given the social complexity and ambiguity around perceived chilling effects, the thesis argues that this exercise would be informed by more detailed monitoring and analysis of specific contributory factors, such as individuals' access to legal resources, legal knowledge and experience of direct or indirect threats of legal action. A more precise understanding of these elements in their wider social context would help the design of proportionate legal dispute mechanisms and the development of public legal education initiatives.

A note on the text

Terms: A glossary is provided in Appendix One to explain formal and colloquial legal and media terms and acronyms, although more nuanced definitions, such as the 'public interest', will be explored during the course of the thesis.

Interviewees: In instances where interviewees are anonymised, a brief description of their professional backgrounds is given in Appendix Three.

Jurisdiction and time frame: In a digital publishing environment, a journalist expecting to reach an audience based in England and Wales could in fact find themselves the subject of litigation in an entirely different jurisdiction. However, it is more likely they would be pursued in, or threatened with, the English courts, which are the predominant geographical setting for the thesis, over a five-year period, 2008-13. The thesis, however, allows for some developments outside this time period, up until mid-2014. For simplicity's sake, reference to developments in England and English courts should be taken to mean England and Wales. While at times this thesis discusses the UK as a whole, it should be noted that there are different systems and issues to consider when examining defamation, privacy and press regulation in Scotland and Northern Ireland, which are beyond the remit of this research.

Types of media: The research mainly considers the effects of defamation on national newspapers and online writers, including bloggers, but other forms of media also fall within its scope, as part of the wider legal landscape. Reference is often made to 'media' use of specific terms and concepts (for example, the chilling effect), in contrast with academic and judicial or legal use. While the limitations of this simplification are acknowledged, it can be taken to mean non-specialist use by journalists and media organisations and other users of social media and blogs.

Referencing / house style: While the thesis explores legal themes, the style is based on writing and referencing conventions in the arts and social sciences. I have predominantly used the Harvard referencing system, including for legal cases and statute, based on the Anglia Ruskin University guide available online.¹ According to this system, non-italicised case names and years are included in-text, with the full legal citation (usually the neutral citation), supplied in a case list in the bibliography. Where possible, I have referenced open access materials from reliable sources. Judges are generally referenced with their in-court title at the time of making or writing the statement (i.e. Lord Justice (LJ), or Mr Justice (J)). Newspaper and other publication titles are non-italicised in-text.

¹ See: <<http://libweb.anglia.ac.uk/referencing/harvard.htm>>.

Previous publications: A number of the ideas and arguments in this thesis have been used and tested out in blog posts and online articles. Previous academic publications that include material used in this thesis are listed below. Extracts from co-authored pieces are marked clearly in the text.

- Barnett, S. and Townend, J., 2014. 'And What Good Came Of It At Last?' Press-politician relations post Leveson. *Political Quarterly*, 85(2), pp.159-169.
- Barnett, S. and Townend, J., 2014. Plurality, policy and the local: can hyperlocals fill the gap? *Journalism Practice* [online], 9 September. Print copy forthcoming.
- Williams, A., Barnett, S., Harte, D. and Townend, J., 2014. The State of Hyperlocal Community News in the UK: Findings from a survey of practitioners. [online] UK: Cardiff University, Birmingham City University and University of Westminster. Available at: <<http://hyperlocalsurvey.wordpress.com/>>.
- Townend, J., 2014. Online chilling effects in England and Wales. *Internet Policy Review* [online] 3(2).
- Townend, J., 2013. Closed Data: Defamation and Privacy Disputes in England and Wales. *Journal of Media Law*, 5(1), pp.31–44.
- Townend, J., 2013. Leveson online: A publicly reported inquiry. *Ethical Space*, 10(1), pp.14–21.
- Bennett, D. and Townend, J., 2012. Press 'Omerta': How Newspapers' Failure to Report the Phone Hacking Scandal Exposed the Limitations of Media Accountability. In: R. Keeble and J. Mair, eds., *The phone hacking scandal: journalism on trial*.
- Townend, J., 2011. Navigating digital publishing law without a 'night lawyer': an exploration of informal legal support networks. *Cultural Policy, Criticism and Management Research* [online] (5). Available at: <<http://culturalpolicyjournal.wordpress.com/past-issues/issue-no-5/navigating-digital-publishing-law/>>.

1. Introduction

1.1. Scope of research

A journalist is threatened with libel action over a short blog post, apologises and takes down the entire site for good. A local blogger sees a public interest story he would like to re-tweet about an elected representative, but hesitates and decides not to, fretting over the potential legal ramifications. A crowd-sourced investigative site is unable to afford legal insurance and is forced to change the type of content it publishes. An academic has to water down his discussion of a high profile media corporation as a result of the publisher's fear of libel action. A blogger avoids stories about a particular local politician, knowing he is litigious. A report into events at a major public corporation is redacted to remove the risk of libel actions by its own, or former, employees. These are all recent incidents in the UK where freedom of expression in the public interest appears to have been detrimentally restricted by the spectre of libel law. This is often described as the 'chilling effect', in which individuals and organisations self-limit their expression for fear of being sued for libel.

Set out like that, such a labelling exercise sounds simple. In practice, it is not. Those examples were carefully chosen, as clear illustrations of the detrimental impact of libel, where there was substantial evidence for the role of libel and where anticipated legal ramifications affected what was arguably public interest activity. In actuality, the chilling effect is defined in many different ways, and it is not always easy to establish whether the fear of libel is exaggerated, whether a libel claim would be legitimate, or whether other factors have also limited the decision to publish or pursue particular information. At the worst end of the scale, individuals self-censor material that would be legitimately protected as 'public interest' material within legal frameworks, although it is arguable that latitude should also be given to facts of a lesser social importance (see Rowbottom, 2012). The chilling effect is not an objective or verifiable reality: it exists

through protagonists' perception of the law and its effects; this will vary depending on jurisdiction and the form of national laws, the resources available to the publishers and their prior legal knowledge and experience.

The roots of the concept lie in mid-20th century US case law. For one US Supreme Court Justice, the 'ubiquitous' chilling effect was an 'amorphous' and 'slippery' doctrine (Zwickler v Koota [1967]), but other judges have found it a useful illustration of the way in which free speech is illegitimately deterred by over-reaching regulation and law. It could be described literally as the 'detering effect'² but the use of chill conjures a more powerful image of shivering, being frozen, or numbed.³ Not only has the chilling effect become 'one of the most heavily-relied upon metaphors in [US] judicial decision making' (Bosmajian, 1992), it has spread widely to other areas of law and public activity and is used loosely in media and social contexts. The concept was at the heart of the UK campaign for libel reform in 2009 and references to the chilling effect have peppered media coverage of communication law and regulation in recent years. It was used prolifically in commentary on the Leveson Inquiry into the culture, practice and ethics of the press; so much so that Lord Justice Leveson 'could be a latter day Mr Freeze' (Jukes, 2013).

This thesis interrogates the chilling effect concept, as part of a wider study of the relationship between defamation and privacy law and journalistic practice in the UK, specifically England and Wales. It considers the empirical evidence informing social and legal definitions of the chill and the changing role of lawyers in the legal process. It also looks at other types of influences on the suppression of public interest material. For Leveson LJ, it was not only details of illegal or unethical practice that were relevant to his Inquiry. 'Increased pressure on newsrooms, with reducing staff and tight financial constraints, the impact of 24/7 reporting and the immediate availability of news on the

² The chilling effect does not necessarily translate neatly into other languages; in German, for example, it could be translated in a variety of ways.

³ For a full exploration of the meaning of this metaphor see Bosmajian, 1992.

internet, the use of casual or freelance staff and the pressure whether expressly thrust upon them or impliedly felt by them...' could also 'constitute important elements of the wider picture' (Leveson, 2011, para.6, p.2). This thesis follows that approach, looking at editorial legal decisions in the round.

Editorial decisions relating to libel and privacy are made in the context of other news production influences, within the digital and 'networked information economy' (Benkler, 2006). They are not necessarily taken in a central and definable location; as Wahl-Jorgensen has discussed, a physical newsroom may not even be the most relevant central ethnographic location for the study of news flows. In her view, it is necessary 'to come to terms with the fact that (a) news production is increasingly taking place in and through virtual spaces, (b) news work is becoming increasingly decentralised, and (c) journalism is increasingly reliant on casual labor that is not tied to particular locations' (Wahl-Jorgensen, 2009, p.33). In recognition of these changes to journalistic practice, this thesis examines digital and decentralised news work in England and Wales over a five year period, 2008-13, through empirical data gathered from media lawyers and journalists. It analyses high profile national media-legal events to understand how libel and privacy have affected patterns of collective coverage, or non-coverage of information between and within different news organisations. It does not ignore physical newsrooms (indeed, Chapter Four draws heavily on the experiences of in-house lawyers in traditional news environments), but considers these interactions in the context of a wider networked news environment.

Assumptions are often made about the intentions and behaviour of the protagonists in libel and privacy related interactions and cases, which cloud analysis of law and its interaction with journalism.⁴ Alternatively, this thesis emphasises that these processes

⁴ This was put succinctly in a blog post noting the European Court of Human Rights (ECtHR) decision in a defamation case dealing with a news site's treatment of online comments (Delfi v Estonia no. 64569/09 [2013]): '...the Court seems to have naively assumed that every injured party acts in good faith, the reported content is always in fact unlawful and Internet filters are the silver bullet to deal with all the different types of illegal content that circulate on the Internet' (Guillemin, 2013).

are developed through the sometimes unpredictable actions of the main parties: potential claimants, defendants and their representatives. The overall aim of the research is to untangle competing subjectivities around defamation and privacy law, journalism and the associated concept of the chilling effect, to inform policy that will bolster freedom of expression in ways that hold both the media and claimants to account, despite parties' varying levels of resources and societal status. First, it asks an empirical question: what are media lawyers' and print and digital journalists' interactions with defamation and privacy law? Second, it asks a normative question: how should these interactions be interpreted and mediated in judicial, academic and policymaking fields, and what policy changes are needed?

This introductory section sets out the disciplinary basis for the research, provides an overview of each chapter and the methodology. But first, a few important points about the scope of the study and its contribution to existing academic literature.

Timescale

This has been an extraordinary period in which to study media law and policy in England and Wales. I began gathering material in 2010, when the libel reform campaign – calling for an overhaul of defamation law that was perceived as overly onerous on publishers - was at its height, and was wrapping up the research when the Defamation Act 2013 came into force in January 2014. This four year period also saw intense developments and drama in other areas of media law and regulation, including, but not limited to: the furore over super injunctions protecting private or confidential information; the tipping point of the phone hacking scandal with the revelation that News of the World had intercepted the voicemails of the missing schoolgirl Milly Dowler, leading to the creation of the Leveson Inquiry; fierce debate over the future of press regulation; and the continued development of a new tort of 'misuse of private information'. Meanwhile, methods of technological communication have been changing fast, with both positive and negative consequences for freedom of expression: social media channels and search engines are wonderfully enriching tools for journalists, but

at the same time journalists are ever more vulnerable to state and corporate surveillance at the cost of source confidentiality and the protection of whistleblowers. The research has attempted to keep pace with media-legal developments, and changed focus when opportune. While sensitive to the particularities of the period of study, it sought to identify persisting themes and patterns in media-legal interactions over time, and it is hoped that the main arguments and recommendations will prove pertinent even with further technological and legal upheaval to the contemporary media landscape, however dramatic.

Legal themes

The initial premise of the study was to examine legal interactions around defamation in England and Wales over a five year period, in order to build a clearer picture of the legal climate for publishers, focusing on journalism and journalistic activity in particular. As will be set out in more detail in Chapter Two, English defamation law is perceived to be favourable to the interests of claimants rather than defendants (often media publishers), owing to the structure of defamation as a strict liability action, with the burden of proof generally falling on the defence, and the high costs of defending an action. I wanted to explore how these legal conditions affected journalistic practice on the ground, especially in digital environments. My initial interest was sparked by the report launching the libel reform campaign (Glanville and Heawood, 2009) and a short study by Barendt, Lustgarten, Norrie and Stephenson (1997), which had looked at the impact of libel on the media in the UK 13 years earlier, just before the enactment of the Defamation Act 1996 and before the widespread use of the internet and digital technology in journalistic practice. My research proposed to examine and add to the data informing the new report, and repeat some of the research exercises carried out over a decade before.

Once underway, however, I decided to widen my scope to incorporate interactions relating to particular aspects of privacy law, primarily the developing tort of misuse of private information, which has evolved from the equitable action of breach of

confidence.⁵ An individual's right to privacy is entwined with reputational rights, both in terms of journalistic practice, the substantive and procedural law, as this thesis will show. The European Court of Human Rights (ECtHR) is increasingly considering the way in which rights to reputation, traditionally protected under national defamation laws, could be protected under Article 8 of the European Convention on Human Rights (ECHR), the right to respect for private and family life (see Rogers, 2010; Tomlinson, 2014), although defamation and misuse of private information are treated as separate causes of action by the English courts. Early conversations and observations of news practice indicated that libel and privacy concerns were not easily separable at the editorial decision making stage, so much so that it seemed difficult to consider one in isolation of the other. Furthermore, during the period of study there was growing concern over the rise of so-called super injunctions protecting private information, crescendoing in spring 2011: this provided an important case study through which to analyse media-legal interactions and the chilling effect concept.

The thesis looks at defamation and privacy as it relates to media and journalistic practice, focusing on 'news publishers' and items (a) defamation, (c) breach of confidence involving publication to the general public; and (d) misuse of private information, as specified in a list of 'publication and privacy proceedings' set out in a 2013 statutory instrument (The Conditional Fee Agreements Order 2013, sec.1 (2), my emphasis):

"news publisher" means a person who publishes a newspaper, magazine or website containing news or information about or comment on current affairs;

"publication and privacy proceedings" means proceedings for -

(a) **defamation;**

(b) malicious falsehood;

(c) **breach of confidence involving publication to the general public;**

(d) **misuse of private information;** or

⁵ See discussion in *Mosley v News Group Newspapers Ltd* [2008] para.181-197; in discussing whether exemplary damages could be awarded in a 'breach of privacy' case, Eady J described the action's origins in the law of confidence. For a general overview of the evolution of privacy law, see Joint Committee on Privacy and Injunctions, 2012b, pp.9-12. More recently, the claim of 'misuse of private information' has been recognised as a standalone tort, separate from the equitable claim of breach of confidence (*Vidal-Hall & Ors v Google Inc* [2014] paras.50-70).

(e) harassment, where the defendant is a news publisher.

In order to keep the research focused and manageable, the thesis does not consider at any length the following legal topics: data protection, harassment, contempt of court and criminal offences related to communication and publishing, although these are important areas of concern for news publishers.

Media regulation was always going to be an important theme of the research, especially as regards the potential development of Alternative Dispute Resolution (ADR) routes. While the seeds had already been sown for the eruption of the phone hacking scandal with Nick Davies's initial revelations (2009), the original research plan had not allowed for the impact and extent of the Leveson Inquiry, which led to recommendations for an overhaul of press regulation. The report and witness evidence provided rich data and insights into the workings of the press and drew attention to issues that prompted new avenues of inquiry. At the time of writing, the future of national and regional 'press' regulation is still unclear: a significant proportion of national and regional newspapers have signed up to the new press regulatory body, the Independent Press Standards Organisation (IPSO) (but not the Financial Times, the Independent newspaper titles or the Guardian), and a different system has been proposed by a new organisation described as the Independent Monitor for the Press (IMPRESS), founded by Jonathan Heawood, former director of English PEN. Whether either of these two bodies will seek recognition under the new Royal Charter (part of the government's response to the Leveson proposals, although not the legislative model recommended in the report) remains to be seen, and is a question that falls outside the scope of this thesis.

What type of media?

This thesis will mainly look at *journalism*-related defamation and privacy, focusing on 'news publishers', but with some flexibility. Journalism is rather a broad and ambiguous label, as will be explored in Chapter Three, but most accurately describes the focus of this study. Following the decentralised research approach described by Wahl-Jorgensen (2009), this research looks at both media-legal decisions within and outside physical

newsrooms in England and Wales. It does not focus on particular organisations, but looks at journalists and bloggers working for national, regional and specialist media publications. In particular, it looks at two specific domains of journalism within the broader sector: first, the 'press' as considered during the Leveson Inquiry, focusing on national newspapers; and second, hyperlocal websites, which are, in general, small online publications about local areas.

The 'press' and 'hyperlocal' categories were chosen as representing two important but very different groups in the UK media landscape: the former is well-resourced, yields remarkable political clout and has a long history as an identifiable domain of journalism; the latter describes operations typically run on a shoe-string, lacking in social and political recognition, and is very young as a recognised category of media. Both these labels are metonymic and without fixed membership but could be delineated fairly clearly for the purpose of this research, as explained below.

The 'press' is used here to describe the print and online publications associated with regional and national newspapers and magazines, normally part of large media companies, although 'press' rights and freedom are often understood to apply to institutional media, including broadcasters, more generally (see West, 2014). While it is very likely that the Leveson understanding of the press, which generally focused on the 'work of newspapers' (2012b, para.2.2, p.440) and was concerned with the regulation of 'all major newspapers' (2012a, p.16), will change over time, it represents perhaps the most powerful media grouping in the UK. This is despite declining print sales and loss of advertising, and a new range of online news competitors. The national press is a particularly salient and recognisable category in the UK with entrenched, if changing, political influence and public impact (see, for example, Duffy and Rowden, 2005; Curran et al. 2009), and plays a leading role in 'setting the agenda for the nation's political discourse' (Toynbee, 2003). Interestingly, as Leveson observed, the Terms of Reference of the Inquiry 'clearly visualise' "'the press" as capable of being a sufficiently homogeneous group' (2012b, para.2.4, p.441).

'Hyperlocal' is a term originating from the US that describes online local news and information services, normally independent from large media owners. It is, according to William Perrin, founder of Talk About Local, a metonym rather than a literal label (akin to using 'the press' as a category of media) that can describe sites and services covering big as well as small places (Perrin, 2013b). In the first extensive report on the hyperlocal sector in the UK, Radcliffe gave a more conservative definition, excluding cities or areas larger than towns: 'Online news or content services pertaining to a town, village, single postcode or other small, geographically defined community' (Radcliffe, 2012, p.6).

Radcliffe does, however, acknowledge that 'audience perceptions of what constitutes "local" vary considerably' (2012, p.6); the same could be said for 'community'. A further complication is that producers of some sites and services that appear to fall under the hyperlocal umbrella dislike the term, and would not necessarily promote themselves as such (see, for example, John, 2011). Nonetheless hyperlocal has emerged in the last few years as a dominant and widely recognised term to describe local and community online media, to the extent that it is specifically mentioned in the recent Department for Culture, Media and Sport consultation document on media plurality (DCMS, 2013b, p.25). Moreover, the Technology Strategy Board, working with the 'innovation' charity Nesta, is investing £2.5m in projects that 'demonstrate the potential of hyperlocal media technologies to serve communities across the UK' (TSB, 2013). The form of content as well as the size of the area covered varies significantly from site to site: from online versions of parish newsletters to projects developed by professional journalists, such as the Guardian's short-lived local sites in Cardiff, Edinburgh and Leeds - a pilot that ran from 2010-11. Hyperlocal initiatives are not necessarily based on a single website: they might be a Twitter account, a Facebook page or a discussion forum. They may not be designed as 'journalism' or 'news' and producers may not wish to be pigeon-holed as 'citizen journalists' (Radcliffe, 2012, p.10).

While it might be expected that understanding of these press and hyperlocal categories will shift with further technological development and changes in media audience habits, the hyperlocal and press categories were chosen as pertinent and significant groupings through which to address the research questions about defamation, privacy and journalistic practice. In the main, the form or mode of journalism considered is digital and print. The media lawyers interviewed had experience of different types of media, although most of the in-house media lawyers were based at national newspaper titles. Surveys, described in detail below, captured responses from journalists working for national and local media (mainly online) based in England and Wales (so far as that could be realistically established) and, separately, hyperlocal operations. The scope was decided with two principles in mind: it should be wide enough as to capture the essence of 'networked' and inter-organisational news practice, but specific enough to allow useful analysis about particular media sectors.

Existing literature

As noted above, two empirical projects had inspired this research (Glanville and Heawood, 2009; Barendt et al., 1997). Both gave rise to interesting empirical and normative questions about the impact of libel on the media, and the nature of the chilling effect in digital news environments. Once a thorough literature review had been conducted, it was possible to identify gaps and consider what this new research might usefully offer.

While several legal academics have already considered the effect of defamation on journalistic work in reference to the chilling effect in various jurisdictions (which are set out in Chapter Two), there is surprisingly little sociological or ethnographic interrogation of the chilling effect concept within media and communications scholarship (with notable exceptions such as extensive comparative sociological research by Kenyon and colleagues on the UK, US, Australia, Malaysia and Singapore: see, for example, Kenyon, 2010; Kenyon and Marjoribanks, 2008a; c), and furthermore, there is a paucity of evidence and data on the scope of defamation in England and Wales

in the last five years. Separately, wide-ranging sociological studies have examined issues around censorship and freedom of expression more generally: in relation to press ownership, newsroom practice and networked journalism, but in general have paid scant attention to the work and influence of lawyers and the law, or generalise about the role and influence of the 'state' and law. This thesis offers findings and analysis to address these gaps. It attempts to develop the chilling effect analyses offered in the legal and socio-legal literature, and enhance sociological understanding of the role of lawyers and the law in shaping editorial decisions and news flow. Additionally, it tries to look beyond the 'impact' or effect of law, assumed by the chilling effect concept, to the two-way interaction between law and journalism, as is explained further below.

The literature review revealed that there are clear holes in the data informing related policy debates; as I have argued elsewhere (Townend, 2013a), the data are 'closed' and not open, contrary to an approach of open justice, and the government's policy commitment to open data and transparency. It is hoped that this thesis not only adds to academic discussion of this topic, but offers something of practical use to practitioners and policymakers by setting out the data in a more systematic fashion than has been attempted to date.

1.2. A socio-legal approach

This research was made possible by the support of the Centre for Law, Justice and Journalism at City University London, the first major interdisciplinary centre of its kind, to look at law, justice and journalism in society.⁶ The Centre encourages an interdisciplinary approach, drawing on other fields to enhance knowledge and understanding. With this in mind, and drawing on the expertise and interests of staff connected to the Centre, I devised a project within its 'legal restraints on the media' theme that combined the methodologies and approach of legal and socio-legal study with those of media sociology and anthropology. This, I suggest, is an example of socio-

⁶ For more details, see the Centre website at <<http://www.city.ac.uk/centre-for-law-justice-and-journalism>>.

legal media scholarship: a useful way of approaching media law and regulation and one that deserves further attention and development. As Kenyon and Marjoribanks have argued, there is a 'particular and limited version of truth that can be established by evidence in a juridical process' (2008b, p.7). To understand media publication disputes in more depth and their full context, it is necessary to look beyond what is said in court and formal legal settings.

Legal research tends to focus on the nature of law, the effect of law on society and 'excels' at answering the normative question of what law ought to be (Smits, 2012). This is different from the approach taken in social anthropology and sociology, which examine human organisation of social relationships and societies and how life is experienced. Socio-legal studies offers an approach that draws from the disciplines of law and social sciences: an opportunity to look at the way in which law shapes society, and vice versa. This could be described as an exploration of the interaction between law and society (in this case, journalistic practice). However, it would be more accurate to describe this as an exploration of the *overlap* and two-way relationship between the domains of law and society, recognising that the latter is a problematic and inexact term (Feenan, 2013, pp.7–8). Law is part of society; it influences the way people behave, but is simultaneously created by social behaviour and actions. As Willock has described,

The law has a way of penetrating almost every level of society with norms of varying degrees of generality and intensity. It not only controls, it also enables. It creates an infinitely complex circuitry, permitting the making of mutually beneficial associations between members of a society. In the clash of competing claims in the courts lawyers, as judges and advocates, fashion new norms for behaviour. They are involved at all levels keeping the system functioning smoothly. (Willock, 1974, p.3)

Similarly, this thesis recognises that law is socially embedded in everyday life and is not merely an effect or influence, 'fashioning new norms for behaviour'. Thus it examines the growth and development of legal concepts and frameworks in the context of social practice, which, in this instance, is defamation and privacy law in the context of journalism and news work. This may seem self-evident to some readers, but as the

literature review will show, the chilling effect metaphor assumes an impact of law on social behaviour, and many accounts have neglected to consider the fuller social context in which the law develops. An empirical approach has a pragmatic, as well as theoretical purpose: it reveals and explains 'the practices and procedures of legal, regulatory, redress and dispute resolution systems and the impact of legal phenomena on a range of social institutions, on business and on citizens', providing important insights to a range of institutions and policymakers⁷ (Genn, Partington and Wheeler, 2006, p.1).

The thesis draws on approaches advanced by Mac Síthigh and Durant in this regard. Mac Síthigh highlights the way in which the study of cyberlaw demands 'greater attention to objects of study that may not always have interested traditional lawyers, and a greater engagement with the literature on media and communications' (2010, p.58), while Durant's interdisciplinary work on interpretations of meaning in discourse disputes shows how a linguistic account is complemented by a social account. It 'give[s] weight simultaneously to both the communicative and broader social (including commercial and political) interests and intent of the protagonists' (2010, p.14) and allows for an organic conceptualisation of the 'social order of communication', in which new rules apply in online environments (2010, p.15). Adopting that stance, this thesis considers legal accounts of censorship and the chilling effect alongside sociological accounts of newsrooms and media production. This allows for flexibility in the 'social order' of media decision making, in the context of defamation and privacy law, journalistic practice and technological change. It also recognises, like Durant's study, that there is 'cultural baggage' in the application of legal standards (2010, p.128).

There are existing studies that might be put into a category of socio-legal media and communications scholarship. On defamation alone possible candidates include, as already noted, Durant's study of meaning in the media (2010), Kenyon and Marjoribanks's cross-jurisdictional work on defamation (see, for example, 2008c),

⁷ The authors cite: government, the judiciary, law reform bodies, regulatory bodies, universities, social, and economic institutions (Genn, Partington and Wheeler, 2006, p.1).

Barendt et al.'s study of libel (1997) and, additionally, Baker's research on social attitudes to reputation (2008). The social foundations of defamation law are explored in Post's work on reputation as property, honour and dignity (1986), and more recently by McNamara who draws on anthropological and historical accounts of honour as well as legal and socio-legal critiques, such as Post's (2007). In the broader area of digital law and technology, a few examples include: Lessig's study of code and cyberspace law (2006); Benkler's work on information and networks (2006); Murray on the role of cyber lawyers and online communities (2007); Brown and Marsden (2013) on internet governance and the regulatory shaping of code; and Hintz on 'policy hacking' (2013). There is especially innovative research taking place in the US: the analysis of cease-and-desist notices through the 'Chilling Effects Clearinghouse' project (see, for example, Selzer, 2010); quantitative analysis of free expression judgments (Epstein, Parker and Segal, 2013) and social scientific testing of legal claims (Byrne et al., 2014).

Socio-legal media scholarship has not been formally recognised as a discrete category of study in the UK. The media section of the Society of Legal Scholars and various streams of the Socio-Legal Studies Association have provided an academic platform for interdisciplinary papers, and there are Law sections at the large media and communication conferences, but there is not one specific society or academic grouping representing socio-legal media and communications research. It may be that such a group is not needed and sufficient space is given under the umbrellas of legal and media studies. Nonetheless, the important role of interdisciplinary media law research should be emphasised, in academic and policy contexts, and it is the approach adopted here.

The study of media law

Media law is a relatively new area for legal practice let alone socio-legal study; one media solicitor observed that when she started out in practice in the early 1980s 'media lawyers' did not exist as such. Despite the relative youth of the professional field, I encountered a surprising level of conservatism in views offered in interviews and in the policymaking process: legal practitioners tend to make fairly modest suggestions for

changing the system and even outsiders, such as campaigners and academics, are fairly circumspect in their recommendations for reform. For example, despite widespread reservations about the reach of libel, I was not aware of any credible challenge to the rationale for the civil tort of defamation despite the abolition of defamation as a criminal offence in England and Wales. Critics appear to be far more outspoken about privacy law, with commentators such as the political blogger Paul Staines, insisting in 2011 that he did not recognise its presence in English law at all.⁸

As an area of academic study, media law presents particular difficulties for institutional access and the systematic collection of data. This is partly because, as Barendt et al. identified, claims filed in court are just the 'tip of a very large iceberg' (1997, p.41). In fact, it is probable that the majority of journalistic activity related to defamation and privacy takes place informally: at the stage of an editorial decision inside newsrooms or at home, or when complaints are resolved or settled out of court. These interactions are largely undocumented in any systematic way. This is a problem that probably applies to other areas of civil law as well; the study by Genn et al. identified that fieldwork access 'may present greater challenges in civil justice than in the criminal justice field'. While there is 'a wide range of potential sites for non-criminal empirical legal research ... many are more private than the criminal justice field, some may involve commercial sensitivities, and there are less well-developed databases of information' (Genn, Partington and Wheeler, 2006, p.32). More recently, Adler and Simon have suggested that empirical research on civil law in the UK has been 'much weaker' than research on criminal law and justice (2014, p.194).

There are specific problems associated with the study of media law, however. A scoping study on possible research of no-win no-fee agreements observed that there are 'difficulties in relation to claimant media firms where issues of firm and client

⁸ Asked by Lord Janvrin about the impact of privacy law, Staines answered: 'You will have to help me. I am not aware of the right to privacy. Which law is it?' (Joint Committee on Privacy and Injunctions, 2012a, p.1080).

confidentiality are particularly acute' (Moorhead, Fenn and Rickman, 2009, p.2); furthermore, because of the low number of cases, 'discriminating power of any statistical analysis is likely to be modest' (2009, p.39). While a 'meaningful study' of personal injury and employment tribunal claims had a good chance of success, the authors were less optimistic for media-specific research, suggesting: '[t]he characteristics of the (much smaller) market for media law and the participants in that market mean the outcome of a study in that area is likely to be more limited but worthwhile' (Moorhead, Fenn and Rickman, 2009, p.2). Unfortunately, the proposed research did not proceed beyond the initial report.⁹ With these obstacles in mind, some of which became more obvious once the research was underway, the following methodology was used to try and expose more detail about defamation, privacy and its interaction with journalism.

1.3. Methodology

Interdisciplinary research required mixed methods, developed in my academic study of anthropology and sociology and my professional experience and training in journalism. The research is not a complete ethnography of a particular and specific field, but it attempts to utilise ethnographic methods for exploring the areas outlined above, primarily defamation and privacy media-legal interactions in digital and print news environments based in England and Wales. It drew from a range of legal and policy sources and adopted sociological and anthropological research techniques. Unlike doctrinal legal studies, the thesis does not use legal sources such as legislation, judicial decisions and reports primarily to analyse the substantive and procedural law; rather it uses these sources to examine social practice and meaning. It is probably best conceived as a social study of law in practice.

It is a particularly methodologically challenging topic. How best to monitor negatives and absences such as the non-publication of material, or the way in which *a lack of*

⁹ Confirmed by Professor Richard Moorhead, via email, 2012.

resources affects publishing activity? To understand these, it is necessary to examine positives: what material is published and by whom; how do resources enable publication? Methods were chosen that would help record and observe experiences and perceptions of libel and privacy in relation to journalistic practice, allowing comparison between data acquired through different means. Public evidence about the law in practice has been given to numerous select committee inquiries and the Leveson Inquiry, but witnesses may have been constrained by the formal and public setting and the political or judicial agenda of the questioners. I also wanted to gather information from people who would not necessarily normally give evidence to a formal inquiry or consultation, written or orally. My aim was to capture the data more informally and, where appropriate, with the opportunity for anonymity. The approach was broadly qualitative,¹⁰ appropriate for research that is interested in social processes and understanding 'how events and patterns unfold over time' (Bryman, 2004, p.281) and provides a means for 'directly observing the role of the state and law' within social fields (Fligstein and McAdam, 2012, p.198). The statistical analysis presented in this thesis is simple, owing to the small sample and population sizes, and, in places, the reliance on secondary data sources.

Methods overview

The empirical data informs the entire thesis, although particular chapters draw on some sources more than others. **Section II, Chapters Two and Three**, analyse text-based sources: academic articles and book chapters, legal judgments and reports, policy documents and media reports. Key themes and ideas were annotated on PDFs and in a database created using the open-source referencing software Zotero, which allows systematic and prolific documentation of sources, tagging and categorising and the

¹⁰ Qualitative research is defined in a number of ways: it is theory generating (exploratory); flexible; the sample is purposive (snowball / chain); the data collection is researcher-driven and discursive; the inferences are made inductively and the final writing up / reporting of findings is content-driven and malleable in form (Patton, 2002). Where relevant, quantitative techniques can be used to complement this approach. As Cupchik has argued (2001), both approaches are inter-related, with quantitative research helping identify relevant processes, and qualitative research providing the basis for expanding quantitative findings (Fielding and Schreier, 2001).

noting of key quotes or passages. It is particularly useful for collecting online texts as it allows the easy screen capture of a web page at a particular point in time, which is especially important when documenting legal disputes and discussions, when web pages are likely to be removed or altered. Generally, text-based sources were located through library searches, online searches (including Google alerts on key terms, such as the 'chilling effect'), the monitoring of RSS feeds to relevant sources (such as legal and media industry news sources). Legal materials were generally found through the main legal databases (Lexis, HeinOnline and Westlaw) and defamation and privacy cases were tracked through Lawtel, Her Majesty's Courts and Tribunals Service (HMCTS) site, BAILII and PA Media Lawyer and other media law news sources. Media news was monitored and searched through Google, Journalist and the Nexis and Factiva databases. A new tool for searching the Leveson Inquiry evidence, LevesonSayIt, saved a lot of time near the end of the research.

Section III analyses and presents the findings of social empirical research: **Chapter Four** was primarily based on over 30 discussions with media lawyers and media law specialists¹¹ and lawyers' public statements in the media and in evidence to inquiries. Interviewees in a variety of legal roles were approached via email or phone in the first instance, some after we had met at industry events and others through another interviewee or personal contact (known as the 'snowballing' method). They included in-house media lawyers at newspaper and broadcasting organisations, media specialist solicitors and barristers, media law trainers and researchers / campaigners. The aim was to ask them a series of questions about their media legal work, experiences and views. The nature of the questions varied according to their particular role or background (an example question sheet is included in Appendix Two).

¹¹ Owing to difficulties accessing courts data (see below), interviews proved the most useful way of collecting data about legal processes from lawyers. Kenyon made the same observation in his research. He suggests that observation of litigation is an impractical means of capturing a 'representative sample' and 'in any event, observation would only reach activities that are visible within court, which is a small portion of the litigation process'. As an alternative, interviews could 'encompass material like letters before action, the Civil Procedure Rules' pre-action protocols, and other interlocutory steps'. In his view, 'interviews were used as the best available means of learning about practice' (2006, p.107).

Twenty interviews were semi-structured and conducted in-person, almost all for an hour, or more. Some participants requested not to be quoted, or formally recorded but informed the research in general. Otherwise, interviews were recorded on a dictaphone and transcribed using Transana. This software allows time-stamping of text as it is transcribed and the coding and categorising of themes at an analysis stage. Given the length and number of interviews, only a sample of direct quotes was used in the final thesis, from a selected number of interviewees representing different roles in the editorial legal process. Some interviewees asked not to be named, and others requested that material be partially anonymised. In the end, I decided to take an entirely consistent approach and anonymise most participants (following Kenyon's approach) (2006, pp.396–397), although the most extensively quoted interviewees were assigned a code (Y plus a letter); a list of the role/position of these interviewees can be found in Appendix Three. This chapter was also informed by my own observations of news processes while working as a journalist, and 'shadowing' a freelance lawyer on two occasions, at two different national titles.

Chapter Five was based on data gathered through online surveys, perhaps the most methodologically tricky and sensitive part of the whole research. Online surveys, developed on SurveyMonkey, were targeted at online journalists and writers based in England and Wales. The survey was designed with the invaluable help and guidance of Dr Ana Villar at the Centre for Comparative Social Surveys, City University London and tested on a number of journalists and lawyers at different stages of drafting, until I was satisfied with the wording and clarity. The survey sought to capture data about the background and practice of respondents, their access to legal resources, their experience of libel and defamation law and their views of the law and perception of the chilling effect.

Over 200 respondents completed the three surveys informing this thesis. As not all respondents answered every question the sample size for a specific question is indicated in the results reported.

- The first and shorter version of the survey was conducted at a community journalism conference, although this thesis concentrates on the final two surveys (Conference n=16)
- A second general survey was advertised through media industry websites and social media contacts with the aim of reaching those who wrote on a range of topics at a national and global level; it seems likely that those who had an interest in, or who had been affected by libel and privacy law would be more likely to respond (General n=107)
- A third survey was targeted, via email, to 225 hyperlocal or community journalism website publishers listed in the OpenlyLocal directory¹² with the aim of capturing responses from people who may not have previously considered the impact of libel and privacy law (Hyperlocal n=86; response rate 38%)

The analysis compares the general and hyperlocal samples but it is possible that some of the hyperlocal sample also participated in the general survey. For this reason and because there was a slight variation in the question wording between the two (see below), the two data sets were not merged. Percentages are rounded to the nearest whole number. It is not possible to calculate a response rate for the first and second surveys.¹³

¹² See: <http://openlylocal.com/hyperlocal_sites>.

¹³ Using similar methods, I was later involved in a separate surveying exercise on hyperlocal activity as part of a different research project based at University of Westminster with collaborators from the Universities of Cardiff and Birmingham City; this collected responses from one third of the hyperlocal target population of 500 (based on Harte's figure of 496 active hyperlocal sites in the UK (2013)). Some of the results from this fourth survey are cited in Chapter Four, where relevant but are reported more fully elsewhere (Williams et al., 2014; Barnett and Townend, 2014).

The criteria for qualification for the legal surveys were broad. In order to complete the questionnaire respondents had to respond positively that they were first, (a) a journalist or (b) an online writer and second, that their target audience was based in England and Wales. It was the latter qualification that proved difficult. As already noted, in a digital environment a journalist expecting to reach an audience based in England and Wales could in fact find themselves the subject of litigation in an entirely different jurisdiction. However, it is more likely they would be pursued in, or threatened with, the English courts. But a question asking if they were based in England and Wales would not have been precise enough. Some bloggers write predominantly for a British audience but host their content on servers outside the jurisdiction. Other publications with domains and hosting services based in the UK write for audiences primarily outside the jurisdiction. With this in mind, a wording was needed that would help the survey reach people who would be significantly affected by the legal context of England and Wales.

In the second survey (general), the second question asked 'Do you expect your readership to be predominantly based in England and/or Wales?'. This was tweaked for the third survey (hyperlocal) following helpful feedback from a respondent that this might disqualify people who write for national titles with extensive international audiences: the Guardian and Mail Online, for example (see Robbins, 2013). Furthermore, the audience profile can vary between articles and sections within the same publication. For the third survey it was reworded to: 'Do you expect a significant part of your readership to be based in England and/or Wales?'. It was not a perfect solution but, as noted above, jurisdictional boundaries are not easy to determine. Despite the difficulty in wording the question, only one respondent queried it, and based on the answers given I am confident the surveys reached a relevant sample of publishers.

Other problems included finding appropriate wording for the type of journalistic and online work conducted by respondents, with one freelance respondent querying the way in which he was asked to describe his 'main' publishing activity. One of my testers questioned the binary between journalists and online writers. However, I felt that it was necessary to make this category division, as it would allow analysis of whether self-defining journalists faced different issues from online writers who did not call themselves journalists.

It also took some time to devise the section on legal experiences. The second survey (general) asked respondents about the outcomes of threats. If they said that a claim form had *not* been lodged in court, it did not allow them to record an outcome. One respondent pointed out that this missed important data about out-of-court settlements that were never officially recorded as claims. To capture this information in the second survey, a supplementary question was inserted in the 'hyperlocal' survey, which asked respondents about the outcome of threatened legal action which was never issued as a formal claim in court. Inevitably, an online survey does not provide a perfect means of capturing data about experiences and views and faith has to be placed in the accuracy of the answers (they are difficult to verify), but it has yielded rich data that is not officially recorded, nor collected in previous research.

The nature of self-selection and sample bias has to be taken into consideration as well. As already noted, the general survey was advertised via media industry websites and social media. My own social media network includes many journalists and bloggers as a result of working in online journalism and my personal blogging activity about the industry and media law. Respondents were self-selecting, which may have attracted respondents with a particular interest in legal issues or specific experiences. It also made it difficult to track the provenance of responses. However, it allowed collection of a variety of responses from online publishers and journalists, without imposing artificial conditions, such as membership of particular organisations or institutions.

The hyperlocal survey was directly targeted to 225 publishers via email or the contact forms on their sites in an attempt to isolate data about a specific genre of online publishing. The contact list of publishers (not counting contact details or links that did not work) was created using the only known database of hyperlocal sites, the OpenlyLocal directory. Again, respondents may have been more likely to take part if they had a particular interest in legal issues, but the method of targeting by email was designed to reduce this self-selecting factor. For analytical purposes, the hyperlocal sample provides a more reliable representation of a particular sector, but the general sample allowed a wider breadth of responses not limited by my selection of suitable candidates.

Chapter Six followed similar methods to Chapters Two and Three, and mainly involved text-based analysis of legal documents and media texts. The main methodological challenge was carrying out accurate searches of archived news material. Nexis, a database of archived news content, has to be used very carefully, as not all news sources have been captured consistently over time and search terms have to be carefully designed and tested (Baumberg et al., 2012b, p.28; Gaffney, 2013). Where possible, trends identified through Nexis searches were checked against the Journalist and Factiva databases, but it should be emphasised that the search results are an indication of the level of news coverage at a particular point in time, rather than an exact representation, and some items may have been missed. The chapter also records interactions on social media: these were recorded on Zotero, and were discovered through archival search or real-time observation. Owing to my previous employment as a media industry journalist, and my own blogging and social media activity, I have built up a strong social media network of media and legal contacts, primarily on Twitter. People often spontaneously contacted me with interesting examples and observations. I monitored a specific Twitter list of media lawyers, media law commentators and specialist journalists regularly, which yielded useful examples of media-legal

interactions and informative commentary. I was alert to the possibility of missing data through the constraints and bias of my online network, but I tried to monitor search terms and interactions relating to the research themes as widely as possible.

Section IV and the concluding chapters **Seven** and **Eight** drew on material gathered using the methods above.

Selection of case studies

There were several ways in which the research questions could have been approached. I considered focusing on one or two organisations in particular, or one particular aspect of the substantive or procedural law (for example, use of the defence for responsible journalism, which will be explained in more detail below and in Chapter Two¹⁴). In the end, because of the limited access to data and confidentiality issues, as well as the relatively small number of *documentable* legal interactions per organisation, I decided to look more widely, focusing on the impact of defamation and privacy law on journalistic practice, first in relation to national newspaper organisations and more broadly, in relation to online news-related activity based in England and Wales.

As explained above, two particular domains of media were isolated for particular attention in Chapters Four and Five: the press, and hyperlocal media. Specific media-legal events, in which the national media had demonstrated collective publication or suppression of material and involved libel and privacy factors, were chosen for Chapter Six. In terms of the specific legal cases cited throughout this thesis, the focus is on defamation and privacy cases involving journalistic activity, following the lead of the Iowa Libel Research Project's analysis of libel cases in Volumes 2-17 of the Media Law Reporter 'in which courts discussed any type of journalistic performance' (Murchison et al., 1994, p.25). Owing to difficulties accessing English case data in bulk, the full

¹⁴ A specific kind of qualified privilege, based on ten criteria for responsible journalism, introduced in the case *Reynolds v Times Newspapers* [1999]. Now replaced by a new public interest test in the Defamation Act 2013.

questionnaire methodology of the Iowa Project could not be replicated, although it has influenced the methodological approach taken.

1.4. Data access

Access to court records

The biggest challenge for the research was accessing the necessary courts data with which to answer the research questions. Cheer describes how courts data about defamation actions in New Zealand provided 'independent control data' to test against her surveys distributed to media titles, which provided data about the quantity and nature of litigation experienced by New Zealand media organisations (2008, p.8). Unlike Cheer, my surveys were not limited to a set population of media titles, and the lawyers were unable to supply me with hard data, but it would have been useful to adopt her approach as a means of comparing perceptions and individual experiences with court records. I was only able to obtain a partial picture of defamation and privacy related activity from court cases, however. I was not able to conduct any systematic categorisation exercise on court records, as I did not manage to negotiate access to the files held in court.¹⁵

Colleagues in the law school at City University London had encountered similar problems when trying to access records for a proposed project that would have looked at the prevalence of the Reynolds defence (it was not pursued further for this reason). As far I could ascertain, no other researcher has systematically documented the nature of English libel and privacy claims filed in court; the best record is Barendt et al.'s brief summary of the number and type of media claims and outcomes in 1990-94 which clearly needs updating (1997, p.39). As noted in Chapter Six, not even the Ministry of

¹⁵ Kenyon also identified this problem in his UK-based research. Interviews offered 'almost the only source of empirical information about English defamation litigation', as court files 'held almost no information about litigated cases' and 'little information is published about defamation litigation' and transcripts 'cost a great deal relative to total litigation costs'. Perhaps surprisingly, '[i]t seems that lawyers rarely obtain transcripts and generally transcripts were not accessible for research' (Kenyon, 2006, p.107).

Justice was able to track the outcomes of libel claims in a given year although it did analyse a sample of cases for its Impact Assessment on the Defamation Bill (now the Defamation Act 2013) (Ministry of Justice, 2012a). Many claim numbers and names can be found on Sweet and Maxwell's Lawtel service, but this is not a complete record and breach of privacy/misuse of private information claims do not seem to be categorised systematically.

While there is an official HMCTS application process for researchers wishing to access court files (the Data Access Panel application), I was initially under the impression that this would be not be suitable for my enquiry, since the cases I wished to access were technically public.¹⁶ Instead, I wrote to the Master of the Rolls (then Lord Neuberger) in 2011, through a member of the super injunction committee, asking for access to:

1. The number and general nature of the privacy claims made in each of the past five years
2. The way in which these actions have been disposed of
3. The number of interim privacy injunctions over the past five years
4. The way in which these injunctions have been disposed of
5. The number and general nature of the libel claims made in each of the past five years
6. The way in which these actions have been disposed of

The Master of the Rolls' legal secretary advised me that his office was unable to help. One of my interviewees suggested trying the Senior Master at the Royal Courts of Justice. An initial approach in 2012 was unanswered but in late 2013, Professor Eric Barendt and I met the then Senior Master to discuss the data access issues. Helpfully, as a result of the meeting, HMCTS administration staff allowed me to view a list of defamation actions from 2010-12, which are summarised in Chapter Six. Owing to the ambiguity and incompleteness of the record I was shown (it seemed to have too many or too few claims, depending on the year), it would still have been useful to access the physical court records containing claim forms and statements of claim. However, it was

¹⁶ Public in the sense that claim files can be accessed individually for a fee. However, this would be very expensive if looking at all defamation claims over a year; furthermore, the accesser must know the claim numbers for each claim they wish to access – this can only be found out via Lawtel (a paid-for database), the Claims Register which is organised by date, not category, or from one of the parties involved in the claim.

deemed to be too time-consuming for administrative staff to extract the non-confidential parts of the number of files I hoped to access. On the Senior Master's suggestion and with the help of Professor Barendt, I contacted the Master of the Rolls office again. The new Master of the Rolls, Lord Dyson, was willing to support my cause. However, when his legal secretary made inquiries to HMCTS, he was told I should apply via the official researchers' data request route, which can be quite a lengthy process and which I had originally understood to be inappropriate for my research. This information came too late for this research but is something that I, or other researchers could follow up in the future.

Internal records

Even if I had been successful in accessing court files, it would have only shown part of the picture. Beyond formal claims in court, there are unofficial warnings, letters before action, and of course the anticipated threat of a claim (even if it does not materialise), but these are difficult to document. It has already been noted that many media-legal interactions are not formally recorded and are commercially sensitive, with strong financial and social incentives for media organisations and individuals to settle out of court, and off the public record. Although the lack of case and claim data has been observed in numerous reports (see Chapter Six), there has been little impetus to change the status quo. Some lawyers that were interviewed, both in-house and external, did not seem particularly concerned by the lack of collated data. As far as they were concerned, they had a good handle on the shape of litigation through their own experience, and were able to access the necessary records through the legal databases (i.e. judgments; claims on Lawtel).

One solicitor specialising in defendant work was unsure how collated data would be of use to them: 'We're not academics. We do a case, we move onto the next one. Then the next one and the next one. Life's a series of cases and you hopefully learn a bit from all of them'. Statistical research 'wouldn't be of any benefit to a law firm. Might be of benefit to someone else'. In contrast, an in-house solicitor responded positively to a

comment about the need for more case data: 'I definitely agree with you... I think there's a massive difficulty in information being available'. In their view, it would help make decisions about taking a case to trial, and also analyse the impact of the Reynolds defence for responsible journalism on journalistic practice (see below and Chapter Two): 'Are there only a couple of cases on Reynolds, or is it so successful that actually no-one sues on it?'.

As discussed in more detail in Chapter Four and Six, interviewees from media organisations and solicitor firms suggested that it would be difficult to make internal legal records available to me, owing to both practical and confidentiality issues. Considering that records were not supplied to the various committees, or the Ministry of Justice, and the doubts expressed in the interviews, the accessing and analysis of informal records was not pursued further as part of this research. It would probably require a larger collaboration exercise, with the direct involvement of industry figures: for example, the exercise that resulted in the anonymised costs data supplied for the Jackson report (2010a) was co-ordinated by the Media Lawyers Association (MLA). The research implications of this 'closed data' (Townend, 2013a) and the impact on informed analysis and policymaking are explored further in Chapters Six and Eight.

Because of legal sensitivities, and source confidentiality, I cannot always reproduce the full details of the stories and observations that have been shared with me. As far as possible, I have tried to thoroughly document interactions using available and public evidence. The small sample makes it difficult to delve beneath the simplicity of public claims and make an assessment on the legitimacy of the threat, however. This is something that has been attempted by the US-based Chilling Effects Clearing House project which documents the "chill" on legitimate activity, through "weather reports" assessing the climate for Internet activity based on the letters [it] receive[s] and news

reports',¹⁷ but was outside the scope of this thesis, owing to the sample size and access limitations described above.

1.5. Chapter summary

Following **Section I** and this introductory chapter, **Section II** explores the theoretical underpinning of the thesis, with a review of relevant legal and sociological literature that exposes gaps that will be explored through the remainder of the thesis. **Chapter Two** considers the chilling effect and associated concepts of freedom of expression, reputation, privacy and the public interest, highlighting their subjectivities and nuances in legal application and social discourse. **Chapter Three** provides a sociological context for understanding media self-limitation, through Pierre Bourdieu's notion of the journalistic field and more recent interpretations of news values, editorial gatekeeping and media power in practice, including the developing notion of a journalistic ecosystem.

Section III draws more directly on empirical findings in the media-legal environment over a five year period. In **Chapter Four** the role of legal gatekeepers is examined, and explores the behaviour and views of media lawyers, based on participant observation at legal events and in news environments, policy documentation, evidence to parliamentary committees and the Leveson Inquiry, and over 30 interviews and discussions with media lawyers and media law specialists. It considers the influence of lawyers in the legal editorial process.

Chapter Five analyses the experiences and views of journalists and online writers shared in online surveys, with a specific case study on hyperlocal and community media sites, looking at work practices, legal resources and their interactions with defamation and privacy law. It examines how journalists' perceptions of the chilling effect vary, and

¹⁷ See: <<http://www.chillingeffects.org/index.cgi>>.

what legal and social factors contribute to their decisions to pursue or abandon particular topics and stories.

Chapter Six considers the nature and flow of information that influences journalists' and lawyers' editorial decisions. It examines the very limited publicly available data about defamation and privacy interactions and assesses its reliability and worrying omissions. It then offers two case studies in what are described as media-legal events, in which information was collectively publicised or suppressed, and assesses how these examples were shaped by mass media and legal knowledge sharing: first, in relation to breach of confidence and misuse of private information and publicity around so-called 'super-injunctions' and second, on public figures and libel, specifically the late television personality Jimmy Savile and the cyclist Lance Armstrong. It considers the way in which information flows within the media-legal field and how this limits the reporting of material in the public interest.

Finally, in **Section IV, Chapters Seven and Eight** conclude the thesis. Chapter Seven pulls together the theoretical strands of the thesis, suggesting that legal editorial decisions need to be understood in the context of a globalised media-legal environment which pays attention to information flows, the specificities of local and national influences, and legal as well as editorial actors. This will help develop a more nuanced understanding of a perceived chilling effect that shifts attention from the question of its reality or the possibility of its elimination, and instead focuses on its moving component parts and appropriate policy responses. **Chapter Eight** suggests some practical policy recommendations for the gathering of richer – and necessary – data on media-legal disputes and editorial decisions to inform future legal and policy reform, and the encouragement of proportionate and relevant dispute resolution methods that safeguard *protected* freedom of expression, before offering some avenues for future research.

2. The 'chilling effect' on free expression

What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. (Derbyshire CC v Times Newspapers Ltd [1992])

2.1. A popular metaphor

The chilling effect is a pervasive and compelling description for the way in which people limit what they say – or even think about saying – for fear of the legal implications and particularly the costs of resulting civil litigation. Schauer, influential in the scholarly unravelling of the complexities of freedom of expression, describes how 'the very essence of a chilling effect is an act of deterrence' and distinguishes the way in which *people* are deterred, from the way in which an *activity* is 'chilled', although he notes that the two concepts 'go hand in hand' (1978, p.689). In its most useful legal application the chilling effect must be firstly recognised as pejorative, and secondly, as the illegitimate inhibition of speech. This, as Schauer describes, is the chill in its 'invidious' form, where '[d]eterred by the fear of punishment, some individuals refrain from saying or publishing something that which they lawfully could, and indeed, should' (1978, p.693). It has been formally used in courts to indicate where the balance between freedom of expression and a competing right – most commonly privacy or reputation related rights¹⁸ – should be made, but also more casually to describe what is perceived as a legal authority's damaging limitation of speech.

While it has taken on a wider meaning outside a legal context, to describe a wide array of mechanisms that may deter desirable activity, it is the chilling effect in the context of libel and privacy law that is the central concept of this thesis. The concept is key in

¹⁸ Individual rights are not the only competing rights against freedom of expression; there may be state interests such as national security. While relevant to chilling effect studies more broadly, this thesis concentrates on the perceived chilling effect around defamation and privacy law, as it relates to individuals and organisations.

mapping, as well as understanding the defamation and privacy landscape. How has the chill been recognised by the judiciary, media and legal practitioners, as well as members of the public more generally, and what are its social and legal features? This chapter provides the theoretical context for the ideas explored in this thesis. It looks first at the literature documenting the chilling effect from the late 1970s onwards and identifies avenues for further enquiry. It then considers the component parts of the chilling effect relating to freedom of expression, reputation, privacy and the public interest, and identifies the subjectivities and nuances at play. Finally, it provides an overview of recent legal and general uses of the chilling effect, before offering some clarifications and conclusions.

Origins of the chill

The notion of a chill on freedom of expression was first introduced into the US Supreme Court in 1952, according to Schauer, in a First Amendment case which recognised that the unwarranted inhibition of the political activity of a teacher had 'an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice' and made 'for caution and timidity in their associations by potential teachers' (Frankfurter J, concurring, in *Wieman v Updegraff* [1952]). The notion of the chill succinctly described how desirable activity – teachers' freedom and the encouragement of teachers to join the profession – was damaged by illegitimate regulation.

Ten years later, the 'chilling effect' made its entrance in another First Amendment case; the court identified that there was a 'deterrent and "chilling" effect on the free exercise of constitutionally enshrined rights of free speech' (*Gibson v Florida Legislative Investigation Committee* [1963], para.29). Writing 15 years after the first judicial utterance of the chilling effect, Schauer found that the concept of the chilling effect had 'grown from an emotive argument into a major substantive component of first amendment adjudication' and that its use 'accounts for some very significant advances in free speech theory, and, in fact, the chilling effect doctrine underlies the resolution of

many cases in which it is neither expressed nor clearly implied' (1978, p.685). It has of course, since taken on a better known form within the mainstream media and in a variety of contexts, but Schauer's robust account underpins the subsequent leading scholarship, as regards the provenance and development of the phrase.

For many media lawyers, it is the later case of *New York Times v Sullivan* [1964] that most closely resonates with the chilling effect, which held that a state cannot award a public official damages for defamatory falsehood relating to his official conduct unless he proves actual malice. This landmark ruling has been widely perceived to reduce the chilling effect of the threat of defamation actions against US media organisations, but this came 'at a price', in Schauer's view (1978, p.708). It was, he argues, an example of the imperfect solution to avoid the chilling effect; it requires that 'we must prohibit the imposition of sanctions in instances where ideally they would be permitted' (1978, p.685).

It is essential to depart from more simplistic representations of the chilling effect and set out some of its internal complexities and contradictions, an exercise that is rarely attempted when the phrase appears on the pages of media as well as academic texts. The few scholars who have interrogated its form and component parts more deeply have drawn heavily on Schauer in setting out its characteristics, and this analysis follows suit (see, for example: Cheer, 2008; Kendrick, 2013). Despite the evolution of digital technology, and associated case law, his original scheme proves useful for the modern day application of the chilling effect. Significantly, Schauer's analysis identifies that at the heart of the chilling effect concept is an assumption in the First Amendment of the US constitution that 'uninhibited exchange of information' and the 'active search for truth' are positive and desirable activities (1978, p.693). However, his scheme accepts that legal and societal mechanisms can also legitimately inhibit the exchange of information.

Schauer's typology

The 'benign' chill

First, Schauer defines the 'benign' deterrence: 'an effect caused by the intentional regulation of speech or other activity properly subject to governmental control' (1978, p.690). In other words, he explains how the deterrence of speech can be justified where the deterrence is legitimate. This is comparable to what the UK Information Commissioner, Christopher Graham, sees as the 'beneficially chilling effect' of increased sentences for Section 55 of the Data Protection Act 1998, the deterrence of illegal activity (not necessarily related to the press)(Leveson, 2012c, para.2.8, p.1089). Cheer's study of New Zealand media and defamation draws on empirical findings to emphasise the distinction that some chilling effects are permissible and desirable (2008, p.62), suggesting that 'in order to protect reputation, defamation must chill some speech' (2008, p.63). One lawyer interviewed by Cheer says: 'Yes! There is a chilling effect arising from our defamation laws in New Zealand. Whether it is inappropriate is another question. I am not totally convinced it is inappropriate...'. These interpretations suggest that a chilling effect can be understood as benign and desirable, where a restriction is usefully and appropriately applied. More interesting is how this is determined; there is a tension in deciding where to draw the line between a desirable chill and an undesirable chill, and whether such a distinction is valid. As can be seen in the section below on contemporary articulations, this subtlety is often ignored in its everyday - and even academic - use, which can lead to analytical incoherence.

The 'invidious' chill

Second, Schauer describes what he sees as an undesirable chill: an 'invidious' deterrence; 'this can occur not only when activity shielded by the first amendment is implicated, but also when any behaviour safeguarded by the Constitution is unduly discouraged' (1978, p.690). In other words, he explains how the deterrence of speech can be unjustified where the deterrence is illegitimate. The danger of 'invidious'

deterrence, argues Schauer, lies in the fact that something should be published, when it is not:

Deterred by the fear of punishment, some individuals refrain from saying or publishing something that which they lawfully could, and indeed, should. This is to be feared not only because of the harm that flows from the non-exercise of a constitutional right, but also because of general societal loss which results when the freedoms guaranteed by the first amendment are not exercised. (Schauer, 1978, p.693)

The legal and commercial context of decision making

These benign and invidious deterrences fall within a legal system characterised by 'uncertainty and fallibility' (1978, p.697), in which individuals are affected by the possibility of 'erroneous legal determination' and the 'uncertainty in their own minds as to whether their intended behaviour is protected' (1978, p.698). The vagueness of regulatory rules adds to the factors already outlined and the amount of overall uncertainty is increased, 'with a corresponding increase in fear; the ultimate result is a heightened probability of deterrence' (1978, p.699).

A parallel consideration is the high cost of potential civil legal action (1978, p.700). Expression may easily be chilled by 'a simple attack on the pocketbook', although there may also be non-monetary benefits in taking such a risk, such as a 'personal stake in the dissemination of specific ideas' (1978, p.698). However, the commercial decision cannot be assumed: 'a commercial publisher may be able to weigh expected gains against expected losses with some degree of precision' (1978, p.697). This is to say that a publisher may choose to publish an item at risk of a libel action because he is confident that the financial gains of publication will offset the financial loss as a result of a lawsuit. Schauer clarifies that this scenario is more likely to occur when it is a film or book: the distribution of these can be measured 'more accurately than the potential profit expected to flow from the publication of a single article in a newspaper or magazine' (1978, p.697). Of course, in the context of criminal law there may be different kinds of sanctions to consider; Leveson LJ explored these in his discussion of

the chilling effect and criminal sanctions for data protection, and commercial freedom (see below).

Side effects of chill reduction

There may also be undesirable side-effects brought about by measures to try and reduce the chill, adversely affecting other types of socially beneficial behaviour. In view of the decision in *New York Times v Sullivan* [1964], Schauer suggests that potential plaintiffs may avoid risking their 'good names' at all: 'to the extent that this occurs, there is arguably a chilling effect on the entry of individuals into public life'. There are many contemporary examples that illustrate the point. 'I don't think anyone wants politics to be open only to those people who were planning their political careers in their teens', said Gloria De Piero MP (2013), following a national newspaper's pursuit of topless photographs taken when she was a teenager. While she has clearly not been deterred from entering public life, it is easy to see why others in her position might be discouraged from pursuing a political career for fear of negative media coverage or intrusion.

Although Schauer, writing in the late 1970s and in a non-European context, does not talk specifically about competing human rights between freedom of expression and privacy and reputation, he references the 'balancing of competing interests' in *New York Times v Sullivan* [1964], highlighting how the relaxation of expression for one group of individuals in the interest of their rights may have a socially undesirable effect on the rights of another group (1978, p.710). Additionally, and somewhat controversially, it could be suggested that law enforcing authorities are themselves chilled. Leveson LJ, for example, suggested that a 'special enforcement regime' in the Data Protection Act 1998, giving the press special exemptions from legislative provisions, had a 'chilling effect on reasonable law enforcement and, equally, had a high risk of impacting unfairly on individuals' (2012c, para.2.55, p.1081).

The final point to draw from Schauer's scheme is the unavoidable result of the undesirable and illegitimate deterrence of free expression. Even if an invidious chill can be identified, it is necessary to accept there will always be a chilling effect because of the uncertainties and variable behaviour of individuals; any rule will produce some excess deterrence, as he sees it:

Therefore, to say that a regulation is unconstitutional because it has a chilling effect on protected activity is to say virtually nothing at all. What we must look for is some way of determining under what circumstances the inevitable chilling effect becomes great enough to require judicial invalidation of legislative enactments, or to justify the creation of substantive rules that recognize and account for the invidious chill. (1978, p.701)

Schauer's scheme recognises the complexities of the chilling effect and provides a level of sophistication missing in many more recent applications of the term. The points set out below, drawn from Schauer's scheme, are used as building blocks for the ideas subsequently explored in this thesis:

- For analytical precision, an 'invidious' chill must be distinguished from a 'benign' chill, and mechanisms developed accordingly
- Editorial decisions relating to libel risk vary according to the disposition of the decision-maker and the organisational context; indeed, some editorial decision makers may choose to proceed with publication even if they consider a lawsuit very likely
- The vagueness of regulatory rules can contribute to the invidious chill
- Any system will create excess and undesirable deterrence; the focus should be on determining the circumstances of intervention or adjustment to regulatory systems
- There can be negative side-effects (described in this thesis as the 'incidental chill') brought about by measures to reduce the chill: the deterrence of other kinds of socially desirable activity - for example, relaxed regulations on the media may deter the entry of individuals into public life for fear of mistreatment in the media without suitable channels for redress

The following explanation is offered for the purpose of this thesis: the chilling effect is widely understood to explain the illegitimate or unwarranted deterrence of free expression in favour of reputational and privacy rights, undermining the exchange of socially beneficial ideas and the free flow of information in the public interest. However, as this thesis will show, this rests on moving component parts, which are subjectively and variously interpreted.

Chilling effect studies

Post-Schauer development: the two-layer chill

Although Barendt's et al.'s 1997 study started out as an attempt to see whether the chilling effect of libel law applied equally to all branches of the media, it widened to include the practical issues affecting media organisations and the significance of defamation law in England, as compared to Scotland (1997). While the concept of the chilling effect is in the book title and central to the conclusions of the text, the authors are less critical in their analysis than Kendrick (2013, for example) accepting that there is a 'genuine' chilling effect that 'significantly restricts what the public is able to read and hear' (1997, p.191). The authors helpfully provide a two-part taxonomy, which allowed for both 'direct' and 'structural' illegitimate deterrences, or 'chilling effects'. The former, the direct chill, takes place when material is specifically changed as a result of legal considerations, of which the 'if in doubt, take it out' philosophy 'exemplified by most magazine editors and publishers' is part and described as 'conscious inhibition' or 'self-censorship' (Barendt et al., 1997, p.191). Significantly, they identify that this is not necessarily 'uniform': 'different media experience with notably different force'. The second category, the 'structural' chilling effect refers to a 'deeper, subtler way in which libel inhibits media publication'. This prevents the very creation of media content:

Particular organizations and individuals are considered taboo because of the libel risk; certain subjects are treated as off-limits, minefields into which it is too difficult to stray. Nothing is edited to lessen libel risk because nothing is written in the first place. (1997, p.192)

Additionally, there is a secondary form within this 'structural' deterrence, a tendency towards a more polemical and opaque style, favouring comment over 'clear' and 'hard-edged' investigative journalism, which the authors suggest could be a result of the journalists' interpretation of the fair comment defence, perceived as more lenient than the defence of justification in defamation cases¹⁹ (Barendt et al., 1997, p.193). They emphasise, however, that the idea that style has been moulded by the law of defamation is 'untestable', a commonly identified problem for researchers in this area.

The chilling effect concept had become so firmly entrenched in the British media zeitgeist by 2009 - if perhaps less well known outside media, political and legal circles - that Index on Censorship and English PEN were able to use it as the lynch pin of their influential report on defamation in the UK without lingering too long over its definition. The report's authors address the 'chilling effect through the publishing and journalism sectors in the UK', arguing that libel laws had a 'chilling effect on legitimate publication' (Glanville and Heawood, 2009). The report followed an edition of the Index on Censorship magazine entitled 'The Big Chill', which aimed to document defamation laws' global chill on free speech and found that 'civil libel exercises a considerable chill on free speech' (Glanville, 2009, p.3). The phrase is frequently used in media reports and headlines without great elaboration on its meaning, as will be explored further below.

Despite Schauer's excellent groundwork in setting out a precise definition, as Cheer argues, 'many commentators and judges do not attempt to define the chilling effect, or are prepared to assume it exists to some unspecified extent' (2008, p.65). Cheer argues

¹⁹ The authors emphasise that it would be inaccurate for a journalist to act on the belief that presenting allegations of fact as statements of opinion will provide an automatic protection from libel action (Barendt et al., 1997, p.193). Additionally, it should be noted that these defences have since evolved. Section 2 of the Defamation Act 2013 (truth) abolishes the common law defence of justification and repeals Section 5 of the Defamation Act 1952 (justification). Section 3 of the 2013 Act (honest opinion) abolishes the common law defence of fair comment and repeals section 6 of the Defamation Act 1952 (fair comment).

that 'the concept has entered ordinary parlance and understanding, and yet the legal approach to it cannot, as yet, be described under any unifying principle' (2008, p.90). There have been notable attempts to document the chill and defamation law more thoroughly in comparative studies using content analysis (Dent and Kenyon, 2004) and through interviews (Kenyon and Marjoribanks, 2008a; Weaver et al., 2004; Weaver and Bennett, 1993). Australia's National Defamation Research Project, based at the University of New South Wales²⁰ examined social attitudes to defamation through a large survey of over 3,000 people in Australia which revealed a significant discrepancy between their own opinion of a defamatory statement, and what they considered would be the view of the 'ordinary man' of a defamatory statement (Baker, 2008). There are a number of significant empirical studies in the US (for example, Franklin, 1981; Murchison et al., 1994) and an extensive review of Australian defamation cases by Michael Newcity (1991).

This thesis follows the lead of these authors, mainly based in Australia and the US (although they had a wider jurisdictional focus), in adopting a sociological approach to understanding the influence of defamation in the newsroom. There is room for further interrogation of the chilling effect doctrine through this methodology. With the exception of Kenyon et al.'s work in the mid 2000s, there has been limited systematic scholarly research in this area in the UK, and a particular neglect of libel and privacy interactions at the level of the individual blogger. As Kenyon argues, there are better ways than theoretical conjecture to assess the potential for defamation reform (2001, p.546) and his observation that the area deserves greater attention from researchers and their funders still stands over a decade later, certainly in the UK context.

Certain assumptions are still made about the existence and nature of the chilling effect, by academic researchers as well as legal and media practitioners. More empirical evidence would allow further analysis and unpicking of the chilling effect doctrine, and

²⁰ At the Communications Law Centre, now based at University of Technology Sydney.

perhaps even the development of a clear scheme to assess the legitimacy of threats and cases. It would be restrictive to focus solely on legal decisions in any analysis of this nature. As Durant emphasises, '[l]aw and media regulation work practically to settle cases, not to engage in abstract debates' (2010, p.142). This is perhaps illustrated by Lord Hoffman's bemusement at Mr Justice Eady's identification of the concept of 'responsible journalism' as subjective [2006]. For Lord Hoffman, a standard of responsible journalism could be objective and 'greater certainty in its application' attainable through extra-statutory codes of behaviour and a growing body of case law ([2006], para.55). Alternatively, Durant's approach could be adopted to allow for a 'subjective dimension' (2010, p.143) in establishing appropriate standards in media law and regulation, and deciding where the line should be drawn.

In one of the most recent additions to the libel and chilling effect literature, Kendrick highlighted the way in which 'speech intent requirements' (for example, the 'actual malice' standard established in *New York Times v Sullivan* [1964]) within the concept of the chilling effect remain relatively unexplored, to the extent that she suggests that 'the chilling effect is too weak to serve as the sole justification for the choice of one intent requirement over another' (2013, p.1639). More generally, she suggests that a problem with the application of the chilling effect concept is that 'both the detection of a problem and the imposition of a remedy involve intractable empirical difficulties' and unambiguously suggests that the US Supreme Court 'has founded the chilling effect on nothing more than unpersuasive empirical guesswork' (2013, p.1633). However, she, like other scholars engaged in critical analysis of the concept, is reluctant to suggest the chilling effect is not 'real' or should play no role in the development of law relating to freedom of expression. Just as reformers and lawyers are fairly conservative in their suggestions for changes to defamation, scholars remain loyal to the concept of the chilling effect while recognising its weaknesses as a legal doctrine, or explanatory metaphor.

To an extent, comparative research by Kenyon et al. has connected the gap between media and communications research and legal studies, addressing the concern that media sociological study on content neglects the role of law, and content analysis 'very rarely focuses on legal issues' (Kenyon, 2006, p.16) but there is scope for further research. First, in relation to privacy. While there is extensive empirical research on libel and the chilling effect, it has not been extended to breach of privacy and misuse of private information, although the chilling effect is increasingly used in this legal context.²¹ Second, it must pay greater attention to new types of journalism and journalists: interactions between defamation, privacy law and individual and small-scale blogging and online journalism in the UK, in the context of sociological work on contemporary 'networked' journalism and collective news decisions, which will be explored in the next chapter.

2.2. Defining rights to freedom of expression, reputation and privacy

With the overall concept of the chilling effect in this specific legal context in mind, as well as the nuances of its application, it is necessary to examine its constituent parts in a little more detail, before considering its contemporary meanings. These parts include freedom of expression, and the threat posed by competing reputational and privacy rights, which may be defended in the public interest.

Freedom of expression

Freedom of expression and speech is often used loosely and treated as synonymous with freedom of the media or freedom of the press, in scholarly as well as media usage. Yet as O'Neill has argued, the 'comforting rhetoric of rights does not show which of these supposed speech rights matters most, let alone which matters most in specific situations' (2011; also see Barendt, 2007, p.419; Fenwick and Phillipson, 2006 ch. 1;

²¹ Kenyon and Richardson suggest that: '[M]ore consideration might be made of media production practices and the role, if any, that privacy law plays within the decisions of journalists, editors and producers and their legal advisers' drawing on Kenyon et al.'s earlier empirical work on defamation (2010, p.9).

Phillipson, 2013, pp.223–225). Or as Gibbons puts it, 'The media may want to claim that their interests are identical with the protection of free speech but, often, their association with truth and participation in a democracy is only incidental' (1998, p.28). As this section will show, there are important distinctions. Freedom of speech, and within it, specific categories of freedom of media and press, fit into the broader public right of freedom of expression, protected by the First Amendment in the US and by Article 10 of the Human Rights Act 1998 in the UK,²² but the exercise of press freedom in some circumstances can arguably damage the public's right to freedom of expression. In fact, there are instances in which the media infringe the public's right to free expression which includes the right to receive information, in instances of collective media non-coverage, as will be explored in some depth in Chapter Six.

The public's right to freedom of expression

Article 10 is one of the more familiar and frequently articulated parts of the Human Rights Act 1998 (and ECHR), reflecting Article 19 of the Universal Declaration on Human Rights. It states:

'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. (Human Rights Act 1998, 10) (my emphasis)

The emphasis is usually on the right to impart information, in media cases emphasising the right to publish, balanced against a claimant's right to privacy and reputation. Asserting or defending freedom of expression rights costs large amounts of money and for this reason, these types of case often involve large media organisations with well-resourced legal teams, sometimes in collaboration with each other, to share the burden of time and cost. Additionally, institutional media rights may attract more attention because they control the communications tools with which to tell the public about them (and one of these tools is a loud 'megaphone' (see Cathcart, 2012)).

²² For an overview of the way in which the freedom of expression principle has been incorporated into English law see Gibbons, 1998, pp.21-29.

Article 10(1) mentions the right to *receive* information before the right to impart it, a right that is perhaps of more practical pertinence to ordinary members of the public. Until recently, while it has been recognised in European jurisprudence,²³ the right to receive information carried 'very little weight' in domestic and even Strasbourg law but was given greater latitude in a Court of Appeal decision allowing media access to the Court of Protection (Tench, 2010; Canneti in Taylor, Neary and Canneti, 2012, p.48). A similar approach recognising a specific right to receive information is now developing in relation to public and media access to legal proceedings.²⁴ Furthermore, the ECtHR recognises that a high level of protection for freedom of expression, subject to the proviso that individuals act in good faith, can apply to small and fringe groups as well as mainstream journalists: in *Steel v Morris* [2005], the court deemed that in a democratic society 'even small and informal campaign groups ... must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest...' (para.89-90).

Clearly, media rights fall within a broader freedom of expression framework. While media organisations *can* help enable public access to information and participation in debate, it cannot be assumed that the former leads to the latter, and there is risk that the public interest will be overlooked when focusing on 'the rights of journalism rather than the needs of audiences' (O'Neill, 2011). O'Neill maintains²⁵ that 'freedom of expression is for individuals, not for institutions' and that the right does not justify, or necessitate, 'unrestricted rights of free expression' for media conglomerates. In fact, she

²³ See, for example, *Observer and Guardian v The United Kingdom* no. 13585/88 [1991].

²⁴ For example, the granting of access to court documents in *R v Guardian News and Media* [2012] and the treatment of evidence at public inquiries, such as the Leveson Inquiry into the press, and more recently, the Inquiry into the death of Azelle Rodney, who was found to have been unlawfully killed by police.

²⁵ In her Reith lectures in 2002 and most recently, in her submission to the Leveson Inquiry and in a speech at UCL (O'Neill, 2012b; a).

argues, a free press is not 'an unconditional good'; '[i]t is good because and insofar as it helps the public to explore and test opinions and to judge for themselves whom and what to believe' (2002). This separation between forms of free expression and overt recognition of institutional power underpins many of the observations made by media critics in the events surrounding the Leveson Inquiry; for example, the journalist Peter Jukes's argument that the press and media with 'vast private bureaucracies to match those of church and state' are unaccountable powers in their own right (2013).

There are persuasive arguments for special protection of expression for institutional groups, however, which should not be dismissed out of hand when addressing the problem that media rights can, on occasion, detrimentally override wider public rights to free expression. Danbury argues that, if both public and media rights are treated equivalently, there is a danger of 'under-protecting' both press and non-press speech, and that journalism should be afforded special protection (2014, p.253; for context and further discussion, see Phillipson, 2013, pp.224–225, and Gibbons, 1998, pp.28-29). West advances a similar argument for press exceptionalism, delineating between an institutional press ('a naturally evolving subset of speakers who fulfil unique and constitutionally valuable press functions') and 'occasional public commentators' (2014, pp.10–11); for West, 'the objective should not be to treat all speakers equally regardless of whether they are fulfilling press functions, but rather to ensure equal opportunity for all speakers to be recognised as the press if deserved' (2014, p.17). Further to this, there is possibly the need for *different* types of special protection for non-journalists or non-press communicators (for example, bloggers acting without the resource of large organisations who have signed up to certain standards) but it is not a proposition that is explored in any depth here.

Directly competing rights

Not only can the rights of journalism and the needs of audiences come into conflict but there can be competing rights between different types of media institutions. At the Leveson Inquiry, for example, Associated Newspapers, with the support of Telegraph

Media Group, sought to prevent the inclusion of anonymised evidence by 20 journalists working for various media outlets, represented by the National Union of Journalists. As part of its application for judicial review of Leveson LJ's 'gateway' ruling to admit evidence, subject to certain conditions, from journalists who wished to remain anonymous for fear of the career implications if they were identified, Associated Newspapers claimed that the admission of evidence 'infringes the rights of the claimant and of others under Article 10' (Associated Newspapers Ltd, R (on the application of) v Rt Hon Lord Justice Leveson [2012], para.33). While Article 10 considerations did not form the basis of the court's decision to refuse judicial review of Leveson LJ's decision, Lord Justice Toulson pointed out the dual Article 10 rights that might be present:

Article 10, for example, might be seen differently when viewed from the perspective of the journalists who wish to be free to tell their experiences without fear of the risk of career blight, by the alleged victims and members of the public who wish to hear what the journalists have to say, and by the newspaper organisations who wish to receive information about the identity of the journalists so that they can respond fully and freely. ([2012], para.36)

In this instance, there was a tension between the newspaper group's management and the journalists' Article 10 rights, showing how one person's (or institution's) freedom of expression can potentially infringe the free expression of another.²⁶ While the newspaper group was not successful in its challenge on Article 10 grounds on this occasion, nor with regard to other rights, there have been, however, various redactions of written evidence containing allegations about specific media organisations, as permitted by the Leveson Inquiry protocol.

Commercial freedom

Many representatives from the press have maintained that they should be allowed to enjoy certain freedom in order to remain in business. In other words, the commercial ends could justify the means (particular types of content) in certain circumstances. In a well-known speech in 2008, the Daily Mail editor Paul Dacre described how: '... if mass-

²⁶ For another example see how the International Federation of Journalists (IFJ) took issue with the 'Right to Share' principles launched by the freedom of expression campaigning group Article 19 (Boumelha and Costa, 2013), arguing that a more flexible approach to copyright protection would damage journalists' right to freedom of expression.

circulation newspapers, which, of course, also devote considerable space to reporting and analysis of public affairs, don't have the freedom to write about scandal, I doubt whether they will retain their mass circulations with the obvious worrying implications for the democratic process' (2008). As part of his ammunition, he drew on judicial sources and quoted Lord Woolf: 'The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest' (*A v B & C* [2002], para.11, subpara.xii) and Baroness Hale, in *Campbell*: 'It may be said that newspapers should be allowed considerable latitude in their intrusions into private grief so that they can maintain circulation and the rest of us can then continue to enjoy the variety of newspapers and other mass media which are available in this country' (*Campbell v MGN Ltd* [2004], para.143).

Certainly these comments reflect the commercial imperative of media, although do not suggest that this gives media a free rein when reporting scandal. To put Baroness Hale's comments in further context, she was in favour of allowing the model Naomi Campbell's appeal against a Court of Appeal ruling, finding that her right to privacy outweighed the newspaper's right to freedom of expression in this instance. Similarly, Lord Justice Ward, commenting on a hearing in the Court of Appeal, observed that sales of newspapers were a relevant factor in the decision to grant pre-emptive injunctive relief, but in the context of helping determine whether a restriction was proportionate or necessary.²⁷ Later, when Dacre appeared in front of the House of Commons committee in 2009, he defended the *News of the World* newspaper's 'tittle tattle and the scandal and the sensation' arguing that 'they have to be free to interest the public to get the large number of readers they do which also communicates the serious news that you

²⁷ Ward LJ said: 'To restrict publication simply to save the blushes of the famous, fame invariably being ephemeral, could have the wholly undesirable chilling effect on the necessary ability of publishers to sell their newspapers. We have to enable sales if we want to keep our newspapers. Unduly to fetter their freedom to report as editors judge to be responsible is to undermine the pre-eminence of the deserved place of the press as a powerful pillar of democracy. These considerations require the court to tread warily before granting this kind of injunction' (*ETK v News Group Newspapers Ltd* [2011], para.13).

need as the life blood of democracy' (Culture, Media and Sport Committee, 2009, Q. 559).

A more sophisticated articulation is needed. Leveson LJ made a careful distinction between different types of commercial justification in his report when considering the press's arguments against a proposal for changes to data protection law, that would allow subjects access to information held about them by news organisations. One of their arguments was that an 'exclusive' could be damaged if subjects were able to pre-emptively publish their own story, or take it to a rival news publication. In Leveson LJ's view, '[c]are must be taken in this context to avoid rhetorical elision between matters of commercial convenience or profit, on the one hand, and a challenge to the current business model of the newspapers so fundamental as to amount to an abridgement of free speech, on the other' (2012c, para.2.32, p.1076). It is too simplistic to argue that commercial freedom is a prerequisite for freedom of expression; even if it is accepted that the former can be protected by the latter, then distinction must be made between types of risks to commercial media models, with a potential dent in high profits at one end of the scale and a grave threat to a business's very existence at the other. Instead, the more important question is what an industry with an institutionally recognised role, such as the press and media, should be *allowed* to do in order to be financially viable.

This section has examined freedom of expression, the core right upon which the chilling effect is based, and suggests it is characterised as follows: (a) the public right to receive information, protected within this right, can be both infringed and protected by media institutions; (b) there is a distinction between institutional and individual rights, which may need preserving in the public interest (there could be a need for special protection of journalists and possibly non-journalists depending on the circumstances); (c) a decision to enable expression for one party may restrict another's (there can be competing Article 10 claims within the same circumstances); and finally, (d) threats to the commercial survival of media organisations should be a consideration in free

expression decisions, but do not justify the unchecked intrusion of competing rights. Recognition of such nuances will help the development of a clearer understanding of the chilling effect and journalists' interaction with defamation and privacy law.

Protection of reputation

Freedom of expression was described as the core right defining the chilling effect; the perceived chill arises in the event of an illegitimate or unwarranted infringement of this right. This transgression occurs as result of the assertion (or anticipated assertion) of competing factors; in its most common judicial use in England and Wales, this is in relation to reputation. Defamation law protects the reputation of an individual, subject to various conditions developed in statute and case law;²⁸ defamation is a 'mysterious thing', with recognition of reputation as property, honour and dignity, according to Post, in his examination of its 'social foundations' (1986, p.692). How reputation is established is part of a complicated and imperfect litigation process, and the final conclusion may not be entirely representative of wider public opinion (see Baker, 2008). For McNamara, the common law of defamation in England and Australia 'suffers from a fundamental deficiency: there is no principled, theoretically coherent statement of law regarding what is defamatory' (2007, p.1).²⁹

In England and Wales, the civil law of defamation has developed through the common law, supplemented by statute, including the Defamation Act 1952, the Defamation Act 1996 and the Defamation Act 2013, with the latter in force from January 2014. Under the tort of libel - the form of defamation that is the focus of this thesis - claimants are able to seek compensation and an apology for damage caused to their reputation, unless defendants are able to successfully defend a claim under truth (previously known as justification) or honest opinion (previously known as fair comment). Content may also

²⁸ For general definitions aimed at media practitioners, a straightforward guide can be found in McNae's Essential Law for Journalists (Hanna and Dodd, 2012). The lawyer's equivalent is Gately on Libel and Slander (Parkes et al., 2013).

²⁹ McNamara proposes that a single test for defamation should be adopted as part of a reformed legal framework: that 'a publication will be defamatory if it has a tendency to cause "the right-thinking person" in the community to think the less of the plaintiff' (2007, p.229).

be protected by defences of qualified privilege or absolute privilege. Significantly, for the purposes of understanding dispute resolution, the court has a limited role in enforcing a correction and apology, although under Section 12 of the Defamation Act 2013, the court is given wider powers to order the publication of a summary of its judgment. How this will work in practice is unclear: for example, whether the court will be able to stipulate the prominence of the correction (see Taylor Wessing 2013; Parliament.uk, 2013c). Case law plays a central role, and provided a highly important change to 20th century defamation law: it was a House of Lords judgment that gave newspapers' the Reynolds Defence, a specific kind of qualified privilege protecting information of public importance reported and investigated responsibly, based on ten criteria set out by Lord Nicholls. These included:

1. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing
[Reynolds v. Times Newspapers Ltd and Others [1999].

In Reynolds [1999], the House of Lords had recognised for the first time that journalists can be protected by a more expansive form of privilege, on the basis that they satisfy a test of a public right to know and responsible journalism (as indicated by the steps set out above), even though the final House of Lords ruling was in fact in the favour of the claimant, Albert Reynolds (Reynolds v Times Newspapers Ltd and Others [1999]).

This defence was used to the defendants' success in *Jameel & Ors v Wall Street Journal Europe Sprl* [2006], which allowed a relaxed interpretation of the ten-point list (discussed below). The House of Lords found that the Court of Appeal had denied the defendants Reynolds privilege on narrow ground and that the defendant had satisfied the requirements of responsible journalism. It found that Lord Nicholls' 'well-known non-exhaustive list of ten matters' given in *Reynolds* should not be seen as tests which the publication has to pass, nor 'ten hurdles at any of which the defence may fail' ([2006], para.56). Jameel, then, further developed the Reynolds defence, reported in the press as a 'protective shield to investigative journalism' (Dyer, 2006).

Reynolds was, however, seen as inadequate and overly burdensome by critics calling for greater protection of freedom of expression. The report that launched the Libel Reform campaign calls for 'a stronger public interest defence that also extends to journalists and writers who may not appear to be obvious candidates for a Reynolds defence'; additionally, it asks that courts should consider the capacity of the defendant to follow all the steps required for a Reynolds defence (Glanville and Heawood, 2009, p.9). Following the campaign and the parliamentary consultation and pre-legislative process, the Reynolds defence has now been replaced by a new public interest defence in the Defamation Act 2013, set out below; the effect of this new defence on journalists' perception of the law, publishing activity and litigation will need to be monitored – so far as is possible – over time.

Section 4: Publication on matter of public interest

- (1) It is a defence to an action for defamation for the defendant to show that -
 - (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
 - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
- (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
- (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest

disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(6) The common law defence known as the Reynolds defence is abolished.
(Defamation Act 2013)

Reynolds radically altered the rules of the defamation game; less clear is the precise impact on journalistic practice, as will be further explored in Chapters Four and Five.

While, as has already been noted, few critics suggest doing away with defamation laws altogether, journalists have form in challenging the foundation of defamation; the editorial marking the launch of the Manchester Guardian in 1821 complained how the 'present state of the libel law ... renders defence impossible...' (reproduced in the Guardian, 2011). The traditional antagonism arises because journalism's 'fourth estate' status requires it to hold power to account in the public interest, to damage reputations by revealing previously concealed facts and circumstances. There would be no useful journalism without damage to reputation, hence robust defences are built into the structure of defamation law. But the design and strength of these mechanisms is often questioned; and in the case of recent defamation reform in England and Wales, it was felt by campaigners that the legal framework favoured defamation claimants over defendants, with English libel, a strict liability action, considered particularly onerous on defendants, who bear the burden of proving that a publication was defensible. Although the claimant must show that a defamatory statement refers to him or her and that it was published to a third party, they do not have to prove that the statement was false. It is the defendant who must prove that the defamation was substantially true, or that it was honest opinion (formerly known as fair comment), or that the statements are protected by some form of privilege.

Although the new Defamation Act has been largely welcomed by the reform campaign coalition of Index on Censorship, English PEN and Sense About Science, not all the campaigners' demands - made at various stages of the campaign - were met: for example, the reversal of the burden of proof, or the extension of the Derbyshire principle preventing corporations performing public services from suing.

While the chilling effect is most commonly used in application to defamation, and developed in the context of US-based defamation cases, it is also relevant to the growing body of law around individual privacy rights; the increasing number of English privacy cases since the introduction of the Human Rights Act 1998 has prompted commentators to ask whether privacy is the new libel³⁰ (see, for example, Rozenberg, 2009, p.99).

The right to privacy

The specific remedies for breach of privacy and confidence are evolving in interesting and relatively rapid ways, through recent case law. 'Misuse of private information' was recognised as a distinct tort in *Vidal-Hall & Ors v Google Inc* [2014], alongside the traditional law of confidence. Such a tort had been described in previous cases - for example in *Campbell v MGN* [2004], which allowed that a misuse of private information tort, however labelled, 'affords respect for one aspect of an individual's privacy' [2004, para.15]. In *Douglas & Ors v. Hello! Ltd & Ors* [2007] Lord Nicholls recognised that 'breach of confidence, or misuse of confidential information, now covers two distinct causes of action, protecting two different interests: privacy, and secret ("confidential") information', which should be kept separate [2008, para.255].

While these causes of action related to confidence and privacy remain distinct from defamation in English law, developing ECtHR case law is arguably blurring the lines between privacy and defamation cases, and it is not always straightforward to determine whether a complaint should be dealt with as a breach of privacy or

³⁰ Joshua Rozenberg, a freelance legal correspondent, observed that 'when libel cases began to dry up, it looked as if privacy might take its place' (2009, p.99).

reputation; indeed, in some jurisdictions they fall in the same space. 'Increasingly, privacy and libel, once two distinct legal avenues of complaint, seem to be morphing into one big "protection of reputation" lump,' the former readers' editor at the Guardian, has observed (Butterworth, 2011). Whereas breach of confidence and privacy used to be seen as very separate causes of action from defamation, they are increasingly seen in the same analytical and judicial territory as defamation (Busuttil and McCafferty, 2010; Rolph, 2012; Mullis and Scott, 2010, pp.5–6).

Developing the relationship even further, it is now established that reputational damage can be dealt with under Article 8 of the European Convention on Human Rights (see, for example, Mullis and Scott, 2010, pp.5–6; Rogers, 2010), although insufficient attention has been paid to the implications of assessing defamation cases using privacy criteria in recent ECtHR cases (Tomlinson, 2014), and there are a number of unresolved questions about the varying treatment of defamation and privacy in English law, both practically and conceptually.³¹

At an editorial stage, lawyers and journalists have to be alert to the possibility of either a defamation or a privacy claim over a particular piece of content. A complainant's decision to pursue a privacy rather than a libel claim is highly dependent on the strategy deployed by the claimant and his or her lawyers, in view of the system for injunctive relief in England and Wales and the court's approach to private and defamatory information claims. It is far easier to secure a pre-emptive injunction under privacy than defamation law (cf. Eady, 2010). Therefore, if the information is arguably private, a claimant may pursue a breach of privacy claim if it is injunctive relief ahead of publication that is sought, rather than an apology and correction post-publication that can be secured under libel. However, there needs to be a genuine claim of privacy; in

³¹ Sir David Eady, launching the Centre for Law, Justice and Journalism at City University London in March 2010 identified some of the issues: the fact that it is more difficult to obtain an injunction under defamation than privacy; additionally, there is an 'outstanding question of who is to decide, in borderline cases, whether the case should be treated as a claim in libel or as one based on infringement of privacy. Is it the court or is it the claimant?' (2010).

Terry v Persons Unknown [2010], Mr Justice Tugendhat decided that the 'nub' of an application for a privacy injunction 'is a desire to protect what is in substance reputation' (para.193). Therefore in this case no injunction could be granted, in accordance with *Bonnard v Perryman* [1891], which ruled that prior restraint could not be granted in libel cases unless any defence would clearly fail at full trial. A question mark still hangs over whether *untrue* private information can be protected under domestic privacy law, or as Tugendhat J has indicated, whether this only applies to non-defamatory private information (para.80; also see Tomlinson 2010).

In the case of the former president of the Fédération Internationale de l'Automobile (FIA), Max Mosley, a privacy rather than defamation claim was pursued post-publication, despite the reputational nature of the claim that disputed allegations about the Nazi-theme of a sex orgy (found by the court to be untrue). He has since reported that he pursued a privacy rather than a libel claim because he wanted to get the 'Nazi lie' 'nailed as quickly as possible', and libel cases are notoriously slow to go through the courts even though it is defamation, not privacy, which is the usual avenue for challenging a false allegation (Culture, Media and Sport committee, 2009b).

Given the overlap between privacy and defamation at the editorial decision making stage, the unpredictability of the claimant's path, and the ECtHR's consideration of reputational rights under the umbrella of Article 8, it is unsurprising that the chilling effect terminology - traditionally used to describe the impact of libel - is increasingly adopted in a privacy context as well. Little systematic gathering of empirical evidence of the chilling effect of privacy law has taken place, however. Privacy-related law is even more fraught with uncertainties than defamation, centred on the court's actual or anticipated determination of whether a claimant had a reasonable expectation of privacy and whether the public interest outweighs the claimant's right to privacy. It is this latter definition, which forms the final subjective component of the chilling effect concept.

Public interest

*'It is the right of all the Queen's subjects to discuss public matters'.
(Campbell v Spottiswoode [1863])*

For John Ware, a reporter at BBC's Panorama, English libel laws are 'very onerous' and 'mitigate against matters of public importance that ought to get an airing of some kind and are often prevented' (Communications Committee, 2012, para.114, p.33). He captures the idea that if free expression is overly deterred under legal systems protecting individuals' privacy and reputations (and therefore chilled), they could be said to be acting against the public interest. The public interest provides a specific defence in both defamation and privacy, to protect the communication of matters of public importance. But what is the public interest, and how does a journalist or legal advisor assess whether they have met its criteria? In *Reynolds v Times Newspapers Ltd and Others* [1999] Lord Nicholls describes the scope of the public interest as wide and undefined, and cites Lord Denning's definition in *London Artists Ltd. v Littler* [1968]: 'Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment'.

Additionally, the court should pay special regard to freedom of expression: 'The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion' [1999]. As is often pointed out in and outside the courts, judges do not necessarily consider what is in the public interest to be the same as what the public finds interesting (see, for example, Lady Hale in *Jameel & Ors v Wall Street Journal Europe Sprl* [2006], para.147).

The public interest does not feature in Schauer's scheme based on US freedom of expression law, but the concept is touched upon in his discussion of the societal benefit brought about by the airing of 'public issues', expression of 'new opinions' and the 'exchange [of] ideas and information' (1978, p.691, p.705). In English and European case law directly referencing the chilling effect the public interest is a key factor in determining how competing rights should be weighed: in favour of freedom of expression, or in favour of an individual's rights to privacy and reputation. As well as a key judicial consideration,³² it is recognised in the main regulatory codes. The Editors' Code of Practice, administered by the Press Complaints Commission, just replaced by the new body IPSO at the time of writing, stipulates some public interest activity (for example, detecting or exposing crime) but also states that there can be public interest in freedom of expression itself, thought by some critics to be an overly vague statement.³³ It also extended its definition in October 2009, in response to developing case law,³⁴ to stipulate that editors would need to demonstrate that they 'reasonably believed' that publication would be in the public interest and again in January 2012, to require editors to show 'how, and with whom, that [reasonable belief] was established at the time' (PCC, 2014). Brief definitions or references to the public interest can also be found in the Ofcom code and the BBC Trust editorial guidelines but it remains a hazy and subjective concept, without any 'one firm definition', nor 'a universally-understood "shorthand" description' (Morrison and Svennevig, 2002, p.1, p.4).

³² The Public Interest in UK Courts project sets out five ways it is applied in court, at <<http://publicinterest.info/what-public-interest/how-term-arises-court>>.

³³ Morrison and Svennevig's research cites an interviewee from the media pressure group Presswise, who considered the definition deliberately vague: 'Well, that just about knocks down every hurdle that you can possibly put in its way' (2002, p.7). Similarly, Steven Barnett argued in his written evidence to the Leveson Inquiry, 'the notion of a public interest "in freedom of expression itself" which has been adopted by both the PCC and BBC codes can potentially be exploited to justify virtually any egregious intrusion into private lives' (Barnett, 2012b, p.2).

³⁴ See Beales, quoted in Luft, 2009. A 'reasonable belief' element is part of the new public interest defence in Section 4 of the Defamation Act 2013, reflecting the common law approach in *Flood v Times Newspapers Ltd* [2012].

An imprecise definition of the public interest has consequences for the wider definition of the chilling effect, which is, in part, interpreted with reference to the public interest notion. Morrison and Svennevig's research (2002) indicated there was understanding among professionals of the broad principles of public interest,³⁵ although exact definitions are hard to find: 'you know it when you see it', one media lawyer told the joint committee on privacy and injunctions³⁶ (Naik, in Joint Committee on Privacy and Injunctions, 2012a, p.167), reflecting the idea that the public interest is recognised instinctively. However, as Rozenberg notes (2011), this looseness is problematic in a legal context.³⁷ Whittle has suggested that 'a robust definition of the public interest' is possible, and is 'already implicit in codes, statements and legislation' (see Weir, 2009) and suggests eight topics that warrant protection, such as exposing or detecting crime (Whittle and Cooper, 2009, pp.96–97). However, even if this definition was accepted in an English media-legal context, its universality is questionable. Morrison and Svennevig's examination of professional codes of practice and regulatory guidelines from a number of countries found that 'none contained what could be termed a formal definition of "the public interest", although the term itself was virtually universal' (2002, p.7). This also has implications for the social understanding of the chilling effect in a global context; the phrase is used by international internet services to describe content removal requests (by Twitter, for example: see Kessel, 2013).

³⁵ They define these principles as follows: ... 'media information or coverage which promotes the general good, for the well-being of all. These include the identification of wrongdoing and of the wrongdoers themselves, with the media acting as guardians of shared moral and social norms. Under these conditions, and with suitable regard to the relative severity of the individual case, individuals' privacy can be intruded upon – in extreme cases should be – in the name of the greater good' (2002, p.4).

³⁶ The 'you know it when you see it' phrase has been applied to many subjectively defined aspects of journalism and originated in a First Amendment obscenity case in the US, in remarks made by Stewart J, concurring (*Jacobellis v Ohio* [1964]).

³⁷ Writing at the beginning of the Leveson Inquiry, Rozenberg suggested: 'the inquiry is not likely to be impressed with those who say that public interest can be identified only on a case-by-case basis: "You know it when you see it." It is essential to have a clear working definition of the standards by which the media is to be judged' (2011).

Unsteady foundations

The purpose of this section has been to examine the widely accepted definition of the chilling effect, which often – but not always - explains the illegitimate or unwarranted deterrence of *free expression* in favour of *reputational and privacy rights*, undermining the exchange of socially beneficial ideas and the free flow of information in the *public interest*. Examination of each component part has exposed further subjectivities at play, with vagueness at the judicial and political level. The imprecision and uncertainty in defining these parts has led to a wide variety of contemporary meanings for the chilling effect, which are set out below. This next section considers the use and meaning of the chilling effect in English and European jurisprudence, before examining some general uses, including by journalists and most recently, in the Leveson report. As will be shown, the nuances of Schauer's typology are neglected in its social and judicial contexts.

2.3. Uses of the chilling effect

Jurisprudence

Defamation

It was several decades after the ruling in *New York Times v Sullivan* [1964] that the chilling effect concept really took hold in the English courts, although related issues had been considered. In *Derbyshire County Council v Times Newspapers* [1992], the House of Lords drew on *Sullivan* [1964] to explain that while the decision was related to the US constitutional right to freedom of speech, 'the public interest considerations which underlaid them are no less valid in this country'; 'What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important', observed Lord Keith of Kinkel. While this ruling was not as far-reaching as *Sullivan's* prohibition on actions brought by public figures without proof of 'actual malice', it established an important precedent that under the common law of England 'a local authority does not have the right to maintain an action of damages for defamation', and upheld an earlier

Court of Appeal decision to that effect.³⁸ For Youngs, there is a 'strong case' for giving local authorities back the right to sue, providing two safeguards are put in place: 'protection for the defendant who has acted reasonably, and removal of the right to damages with their chilling effect' (2011, p.8).

The 'chilling effect' was again directly discussed in the leading libel case described above, *Reynolds v Times Newspapers Ltd* [1999] although, as Cheer has pointed out (2008, p.66), the dicta 'reveal a House of Lords which is wary of the press and somewhat sceptical of a chilling effect'. Lord Nicholls's explanation of the chill factor echoes Schauer's definition, acknowledging that unpredictability and uncertainty, coupled with the high costs of defending an action, affects a journalist's decision:

The outcome of a court decision, it was suggested, cannot always be predicted with certainty when the newspaper is deciding whether to publish a story. To an extent this is a valid criticism. A degree of uncertainty in borderline cases is inevitable. This uncertainty, coupled with the expense of court proceedings, may 'chill' the publication of true statements of fact as well as those which are untrue. (*Reynolds v Times Newspapers Ltd and Others* [1999])

The chill should not, however, be exaggerated and could vary between different types of publications; in Nicholls's view, 'with the enunciation of some guidelines by the court, any practical problems should be manageable' [1999]. In short, the Lords acknowledged the chilling effect concept in extending the protection of responsible journalism, but as Cheer has suggested, were cautious in accepting its reality and did not consider that the ten-point checklist for the matters to be taken into account in assessing the defensibility of publication by the media (reproduced above) gave rise to further chill (2008, p.68).

³⁸ Public interest considerations were further considered in *Goldsmith and Another v Bhoyrul and Others* (*Goldsmith and Another v Bhoyrul and Others* [1997]), which prevented political parties from suing. However, despite these limitations, individuals within these institutions can sue. In the more recent case of (*McLaughlin & Ors v London Borough of Lambeth & Anor* [2010]), the Derbyshire rule did not prevent school governors from suing. Furthermore, the Derbyshire prohibition is not 'complete' – if a governmental body or political party can prove actual financial loss, they can sue, or sue under malicious falsehood (Youngs, 2011, p.4).

However, uncertainty remained central to the chilling effect concept in Eady J's ruling in *Abdul Latif Jameel Company Ltd. v The Wall Street Journal Europe Sprl* [2004]:

It has to be recognised that there is no more 'chilling effect' upon freedom of communication, or indeed upon the exercise of any other rights such as those of privacy and the protection of individual reputation, than uncertainty as to the lawfulness of one's actions. ([2004], para.17)

His point was underlined, perhaps, by the House of Lords' eventual decision in the Wall Street Journal's favour, overturning the Court of Appeal's and Eady J's earlier decision that the publication did not have recourse to the Reynolds defence (*Jameel & Ors v Wall Street Journal Europe Sprl* [2006]); indeed, the lawfulness of one's actions is not easily predictable.

As in the House of Lords judgment in Reynolds, the claim of a potential chilling effect in the Jameel case was treated sceptically: Lord Bingham – who disagreed with the majority's decision that the newspaper's publication was privileged – examined the national rule allowing recovery of damages by a trading corporation which proves no financial loss (since restricted under the new Defamation Act 2013). He found 'the weight placed by the newspaper on the chilling effect' of the existing rule was in his opinion 'exaggerated' (*Jameel & Ors v Wall Street Journal Europe Sprl* [2006], para.21). Baroness Hale, on the other hand, was more sympathetic towards the negative effect of the chill on the newspaper defendant and raised the issue of a 'disproportionately chilling effect upon freedom of speech' (para.154): 'We need more such serious journalism in this country and our defamation law should encourage rather than discourage it ... if the public interest defence does not succeed on the known facts of this case, it is hard to see it ever succeeding' (para.150–1). The ruling was perceived to have 'considerably reduced the "chilling effect" libel law had long exerted on freedom of speech' (Dyer, 2006).

The chilling effect is an increasingly common consideration in English defamation cases, since its first appearance in the late 20th century. While the doctrine may hold more

sway in cases based in the US than in England and Wales, it has arguably affected influential judicial decisions in defamation cases, as well as broader policy; namely, the introduction of the Defamation Act 2013. Furthermore, it has also been a central consideration in a number of privacy cases.

Privacy

In *Mosley v News Group Newspapers Ltd* [2008], in which the claimant Max Mosley successfully sued the News of the World newspaper in 2008 for breaching his privacy, the High Court judge, Eady J, referred directly to the 'chilling effect'. Exemplary damages were refused on the basis that there was no 'social need' for them; in Eady J's view, such damages would have provided a form of relief in a new area of law that was unnecessary, nor legally prescribed. For that reason, 'the "chilling effect" would be obvious'. For Eady, then, the chilling effect is directly relevant when weighing up the balance between Articles 10 and 8; he has noted Whittle and Cooper's paper on probity, privacy and the public interest, which found the privacy law chill mainly affected 'kiss 'n' tell' journalism and not responsible journalism in the public interest (Whittle and Cooper, 2009; cited in Eady, 2010, pp.12–13) and that few privacy cases are contested with a public interest defence.³⁹

Costs were the main concern in a joint submission to the ECtHR opposing Mosley's bid for a pre-notification requirement - to the subject of a story - ahead of publication; various freedom of expression groups described how the high costs of defending injunction proceedings could cause a chilling effect.⁴⁰ Even successfully defended injunction proceedings could cost £10,000 (and £60,000 in unsuccessful defences): 'It was simply not viable for the media to contest every case where compulsory

³⁹ In an earlier speech he noted that 'the rarity of contested [privacy] claims is largely because there are so few stories where there is any hope of a public interest defence (as was argued, with at least partial success, in *Lord Browne of Madingley*)' (Eady, 2009, see *Browne v Associated Newspapers Ltd* [2007]).

⁴⁰ The Media Legal Defence Initiative, Index on Censorship, The Media International Lawyers' Association, European Publishers' Council, The Mass Media Defence Centre, Romanian Helsinki Committee, The Bulgarian Access to Information Programme (AIP) Foundation, Global Witness and Media Law Resource Centre.

notification would be followed by a request for an injunction. This was the chilling effect of a pre-notification requirement' (interveners' argument in *Mosley v United Kingdom* no. 48009/08 [2011], para.103). The court found that criminal sanctions or punitive fines, 'which could be effective in encouraging compliance with any pre-notification requirement', would create a chilling effect 'which would be felt in the spheres of political reporting and investigative journalism, both of which attract a high level of protection under the Convention' (*Mosley v United Kingdom* no. 48009/08 [2011], para.126).

Unlike many cases which do not thoroughly interrogate the concept of the chilling effect and its subjectivities, the ECtHR *Mosley* judgment raises the thorny issue that the parties submissions differ in their definitions of the public interest: 'on whether "public interest" should be limited to a specific public interest in not notifying (for example, where there was a risk of destruction of evidence) or extend to a more general public interest in publication of the material'. In light of this, the ECtHR observed 'that a narrowly defined public interest exception would increase the chilling effect of any pre-notification duty'. In order to prevent a serious chilling effect on freedom of expression, 'a reasonable belief that there was a public interest at stake would have to be sufficient to justify non-notification, even if it were subsequently held that no such "public interest" arose'. Additionally, the judgment reinforces another element of the chilling effect doctrine: that it anticipates the implications of future behaviour outside the case under consideration. *Mosley's* bid for a legally binding pre-notification requirement is examined beyond the facts of his case, considering the 'chilling effect to which a pre-notification requirement risks giving rise' (*Mosley v United Kingdom* no. 48009/08 [2011], para.132).

The wider implications for future publishing activity were also considered in *Hachette Filipacchi v France* [2007]. A French magazine, *Paris-Match*, argued that it was not violating Article 8 by publishing a photograph of the Prefect of Corsica's body after he

had been assassinated. The publisher also claimed that an obligation to publish a statement explaining it had intruded on the prefect's family's privacy was interference by the authorities in its freedom of expression (see Voorhoof, 2007). The court, however, rejected that there had been a violation of Article 10 and considered that the measure – the publication of a statement – 'was proportionate to the legitimate aim pursued' and, accordingly, 'necessary in a democratic society' ([2007], para.63). Barendt has reasoned that, to some extent, this decision was made because the sanction imposed by the French courts 'would not exercise a significant chilling effect on its freedom of expression' (2009).

Two judges disagreed with the majority, however: Judge Vajic took issue with the court's decision that the penalty had been proportionate, outlining what she perceived as the knock-on chilling effect, even if the sanction occurred after the event: the press 'would always be obliged to publish statements or apologies and would ultimately find it hard to play their role as watchdog in a democratic society' (Vajic J, dissenting opinion *Hachette Filipacchi Associates v France* no. 71111/01 [2007]). Vajic J's framing of the issue indicates that when judges consider the chilling effect, they are not simply considering the case at hand, but the impact outside the courtroom too. Judge Loucaides also looked beyond the effect on *Paris-Match* to explain his dissenting opinion, identifying comparable circumstances that the media should be able to report freely.⁴¹

European jurisprudence also considers the potentially detrimental side-effects of reducing the chill. In *Biriuk v Lithuania* (no. 23373/03 [2008]) the court rejected the

⁴¹ He suggested that deaths could occur in 'natural and other disasters such as earthquakes, tsunamis, fires, tidal waves, terrorist acts and armed conflicts ... the public must be informed of such disasters and all their catastrophic consequences in order to draw the necessary conclusions and act accordingly' (Loucaides J, dissenting opinion in *Hachette Filipacchi Associates v France* no. 71111/01 [2007]).

state Supreme Court's ruling⁴² that the concerns of the local population were legitimate grounds to justify publication that an individual was HIV positive. In its view, a factor of greater importance than the potential chilling effect on free expression was that people in a similar position to the applicant could be put off seeking medical treatment for fear of publicity (see Barendt, 2009, p.49). In this case, then, the balancing act was between the effect on individuals' health and privacy infringement, versus Article 8 and freedom of expression. This relates to the notion explored earlier in this chapter, that there is an 'incidental chill': negative side-effects brought about by measures to reduce the chill, which deter other kinds of socially desirable activity. An individual may be deterred from an important activity – in this case, the seeking of medical treatment – for fear of publicity. In this case, the court considered that to be a factor of 'greater weight' than the threat to press freedom.

In summary, the English and European jurisprudence indicates that the chilling effect doctrine is increasingly relevant to decision making on cases relating to Article 8 and the right to respect for private and family life, with some judges exposing and grappling with its complexity more than others, identifying varying definitions of the public interest, the implications for future publishing activity and recognising that allowing expression could detrimentally impact other freedoms. This takes the concept well beyond its original development in defamation law although it is necessary to keep the procedural and substantive legal differences between privacy and defamation in mind when analysing its application in law and social discourse. The final part of this chapter examines the more general social use and application of the chilling effect concept.

⁴² The Lithuanian court awarded the claimant EUR 2,892 under statutory limits. The applicant alleged that the State had failed to fulfil its obligation to secure respect for her private life as a result of the derisory sum of non-pecuniary damages.

General use

The chilling effect was initially used very precisely to describe the need for broadened defences to protect the publication of stories in the public interest. However, it has now taken on a far wider meaning according to Eric Barendt:

[W]hat has happened in the last five to ten years in this country [UK] is that the phrase has become used in a rather general way to refer to the impact of media law, libel, privacy, maybe contempt of court, in curtailing the freedom of the media to publish any story which they think ought to be published because it's important for the public to read it. So it's used in a rather loose way to refer to the impact of the law, because it deters the media from publishing stories because they're not sure they would succeed in a defence. (Interview, February 2012)

O'Neill's complaint about the imprecision with which terms relating to freedom of expression are used (2011) could equally be applied to the chilling effect, which has been used loosely and in a variety of ways in everyday discourse: by social media users, by journalists and by politicians. During the period of this study, there has been far wider characterisation of the chilling effect than its original form in US case law in two main ways.

First, it is used imprecisely and with sweeping generalisation. A government press release marking the commencement of the Defamation Act 2013 in January 2014 described how it 'reverses the chilling effect on freedom of expression current libel law has allowed, and the prevention of legitimate debate we have seen in the past'. The explanation was brief: 'For example, some journalists, scientists or academics have faced unfair legal threats for fairly criticising a company, person or product' (Ministry of Justice, 2013c).

Although couched in terms of 'ministers claim', this confident assertion was reproduced in mainstream media reports with no interrogation and limited explanation of the concept (see, for example, BBC News, 2013a). Given the extensive discussion around costs and procedure during the legislative process leading to the bill's enactment, the provisions of the Act alone are unlikely to deter the type of activity of which is

complained. To suggest the chill has been 'reversed' is an empty and unsubstantiated claim.

Second, the notion of a chill on free expression through media and communications has been used far more widely than its origins and development in defamation and, more recently, in privacy law. Recently it has been used to describe the implications of data protection law, the tightening of regulation around media-police relations, criminal prosecutions relating to social media and the Metropolitan Police investigations into illegal activity by journalists. It has featured in entirely different contexts as well: in reference to the societal effect of the proposed EU referendum and the economy, for example.⁴³

The chilling effect phrase has been frequently used in the row over the implications of the Leveson Inquiry, Leveson LJ's recommendations for reform and the subsequent regulation proposals, and used frequently in media representations of the debate. A group of media freedom organisations wrote to the Queen to warn of the 'chilling impact' of the government's Royal Charter to underpin a new system of press regulation (Kilman, 2013). As a former journalist, Michael Gove MP has been seen as a defender of the press's corner and he introduced the idea of Leveson's 'chilling atmosphere' in a speech to the parliamentary press gallery, which was widely reported in February 2012, with little to no explanation or interrogation of the concept (Gove, 2012).

Paul Dacre's use of the analogy in his oral evidence to the House of Commons Culture, Media and sport select committee in 2009 showed the fluidity with which the term can be used, as convincing rhetoric. He used it to describe the financial climate more generally, arguing that there are 'chill winds blowing through the printed media industry' that were especially affecting the 'provincial' newspaper industry (Culture, Media and Sport Committee, 2009, Q. 496), as well as to illustrate the dangers of

⁴³ Example sources for various uses of the chilling effect, in order of reference: Halliday, 2013; O'Neill, 2012c; Open Rights Group, 2013; Ponsford, 2012b; Dominiczak, 2013.

creating new privacy statute, which he said would have 'a very deleterious effect, a chilling effect, on the press and the media in general' (2009, Q. 519). He was more specific in his complaints about the costs of defending libel and privacy claims and attributed the chilling effect, in part, to Conditional Fee Agreements,⁴⁴ although he could not cite a 'specific' example of the chill, apart from the fact the paper was 'not going quite as far' as it used to and 'settling things even at the expense of paying disproportionately high damages not to go to court' (2009, Q. 496).

Dacre's use of the concept is one example of how the chilling effect is used blithely and prolifically in public life, often as a rhetorical tool to protect the interests of media corporations; for analytical precision, there needs to be a distinction made between general use of the phrase and the judicial application of the concept, although one may influence the other.

Some guidance is provided by the Leveson report, which discusses the chilling effect in relation to reform of the data protection regime and the possible introduction of custodial sentences for offences under S55 of the Data Protection Act 1998, accompanied by a special defence which allowed for editors' 'reasonable belief' that it constituted activity in the public interest (2012c, para.2.90–1, p.1091). Leveson LJ firmly dismissed the press's argument that 'the prospect of custody would have a differential "chilling" effect on lawful and ethical journalism from the prospect of a financial penalty'. In his view it was a submission 'barely respectable to advance' that 'unchilled journalism' is 'an activity which takes calculated risks with deliberate and indefensible criminality' (2012c, para.2.87, p.1091). However, he did find merit in a 'more respectable' version of the argument that recognised criminality could be

⁴⁴ Costs remain an outstanding issue. They have not been addressed by the Defamation Act 2013, although further recommendations have been made by the Costs in Defamation Proceedings Working Group, after defamation and privacy cases were excluded from wider reforms to Conditional Fee Agreements under Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), and the government has since published proposals for a new costs protection regime. For further discussion, see Chapter Four and Appendix Six.

committed unwittingly (2012c, para.2.87, p.1091). Here a chilling effect (by definition undesirable) could arise as a result of uncertainty; as described above, the vagueness of regulatory rules can contribute to the invidious chill (see Schauer, 1978, p.697). For Leveson LJ, the issue was not one of where the penalty should lie, but whether the public interest defence dealt 'satisfactorily with the boundaries between criminal and lawful journalism'. According to this formulation, the key issue is providing clear boundaries within which journalists can make informed decisions.

As regards the introduction of custodial sentences for S55 offences, Leveson LJ believed the proposed legal reform *did* provide clear boundaries and was 'entirely unpersuaded that the argument that there is a possible chilling effect on legitimate journalism is a reasonable one'. Of course, there is still a subjective element in the proposed defence that editors had a 'reasonable belief' that a data protection breach constituted activity in the public interest (2012c, para.2.90–1, p.1091), but as in other areas of civil and criminal law, objective facts can be used to assess (or defend) the mental intent. Leveson contends that a journalist's genuine belief of public interest would be protected even if their conduct was not found to be in the public interest but as there have been no journalists prosecuted under this part of the (still inactive) legislation it is difficult to explore it further. There is scope, however, for further sociological and anthropological interrogation of the chilling effect concept in relation to defamation and privacy civil litigation, as will be explored in the next chapter.

2.4. Conclusions

The chill and the chilling effect are used as shorthand for the deterrence of media expression across the board. Too often, there are assumptions made about the intentions and behaviour of the parties involved in defamation and privacy cases that obscures a clear view of interactions between law and journalism.⁴⁵ Leveson's assessment of the subjectivities and motives at play is a welcome addition to the judicial

⁴⁵ As noted in Chapter One (see Guillemin, 2013, commenting on *Delfi v. Estonia* no. 64569/09 [2013]).

material on the chilling effect albeit in relation to data protection rather than defamation in this instance.

Although it is tempting to dismiss the chilling effect metaphor for the inconsistent and imprecise way in which it is used, it would be unwise to do so. It is used so frequently by those engaged in freedom of expression discussions, and to powerful rhetoric effect, that it must be examined as part of the study of the interrelationship between defamation, privacy and freedom of expression. It is not necessary, however, to adopt it as an analytical tool, or propose one accurate definition as part of this exercise. Rather, this thesis will expose the various ways in which it is used and assess what this tells us about defamation, privacy and journalistic practice.

An acknowledgement of these subjectivities involved in regulation and dispute resolution and perceptions of the chilling effect is vital, something some legal scholars - the most recent and notable example is Kendrick - have provided, but is often missing in less specialist academic discussion and certainly in its more general use. If the chilling effect concept is to be understood in a policy and legal context, it must be unpacked with reference to Schauer's original schema outlined above.

A more precise analysis is required in policy contexts. Although sometimes used as such, the chilling effect is not a particularly helpful label for *legitimate* deterrence of *illegitimate* speech, where it is accepted that restriction of speech is acceptable in particular conditions (where socially desirable or beneficial). It is more likely to be used as a pejorative label to describe scenarios where it is considered that there is *illegitimate* deterrence of *legitimate* speech (which the status quo may allow); we cannot, however, assume this is what the speaker means. For this reason, no single definition is attempted here. Rather, it is suggested that journalists, policymakers and scholars pay greater regard to what is meant by the chilling effect in different contexts.

It is necessary to recognise the complexities of the application of the chilling effect, with reference and acknowledgement of its moving component parts. If it is suggested that the existing infrastructure wrongly discriminates against legitimate speech, there is a need for different mechanisms for exposing the subjective positions and weighing the balance between the right to freedom of expression and competing rights. Crucially, the conceptualisation of the chill must be extended beyond the media's rights: how might the public's right to freedom of expression be detrimentally damaged by regulatory and legal systems? Furthermore, can the media's right to freedom of expression damage a wider public right to freedom of expression, or cause undesirable side effects in deterring other public interest activity, what might be called the 'incidental chill'? Having set out these clarifications and questions, it should be emphasised that the loose meanings attached to the chilling effect and the chill in everyday use do not render everyday and media articulations useless. They are of interest, and significance, in an interpretation of perceived threats to freedom of expression and the development of better and more robust regulatory and legal mechanisms.

This review of the existing chilling effect literature has exposed a need for more research in contemporary UK-based online environments and in relation to the civil law on privacy, as well as a more nuanced exploration of the chilling effect. Inspiration for the way in which this might be done can be found in the extensive literature on media systems and journalism production, topics which are the focus of the next chapter.

3. The journalistic environment

Legal rights are exerted and disputed in the media process, on an everyday and practical level, in relation to specific editorial issues. In order to understand the formation and substance of theoretical legal concepts, such as the chilling effect, it is important to know what actually happens on the ground. This chapter explores the macro and micro-level media environments in which journalistic decisions are made. It draws on sociological and anthropological literature to set out a theoretical framework in which to situate journalists' decisions, including those relating to the law. It focuses on Bourdieu's description of the journalistic field (1998) and more recent interpretations of news values, editorial gatekeeping and media power in practice, including the notion of a journalistic ecosystem. The review indicates that while many studies have nodded to the impact or influence of the law on shaping journalists' choices, very few have studied English media law in action in great detail.

3.1. Microcosms and ecosystems

The journalistic field

Media scholars have long been fascinated by patterns of news production within journalism, and the ways in which media discourse is affected by the environment in which it is produced.⁴⁶ Scholars have looked at both micro and macro-level influences, but since the late 1990s there has been a marked flurry of research activity around the particular characteristics of the journalistic environment, as a specific professional domain. For Chalaby, the journalistic profession and specific journalistic discourse emerged in the latter half of the 19th century as a 'specialised and increasingly autonomous field of discursive production' (1998, p.1) following the repeal of the British taxes on knowledge between 1855 and 1861 (1998, p.32), while others put it

⁴⁶ An early example is Jeremy Tunstall's 'Journalists at Work' (1971; see Tumber, 2006).

much earlier with the birth of the first handwritten pamphlets in the 16th century (Golding and Elliott, 1979, p.21).

Bourdieu's field theory, along with the associated concepts of *habitus* and *doxa*,⁴⁷ has proved a useful and attractive framework to explain the pressures acting on journalists inside and outside the newsroom and the social conventions of activity, which develops and goes beyond more structuralist explanations for social behaviour (see, for example, Benson and Neveu, 2005; Willig, 2013). It recognises patterns in collective activity without the existence of overt rules, or the 'organising action of a conductor' (Bourdieu, 1990, p.53), and an interplay between structure and agency in the quest for cultural and economic capital; these features make it particularly useful for media theorists, who struggle to make sense of the multiplicity of influences guiding very distinct - and puzzling - patterns of behaviour. For Bourdieu, the field is a structured social space, 'a force field':

It contains people who dominate and people who are dominated. Constant, permanent relationships of inequality operate inside this space, which at the same time becomes a space in which the various actors struggle for the transformation or preservation of the field. All the individuals in this universe bring to the competition all the (relative) power at their disposal. It is this power that defines their position in the field and, as a result, their strategies. (Bourdieu, 1998, pp.40-41)

As Willig has described, this approach helps make 'invisible structures of power and recognition visible' (2013, p.384), exposes the explicit and implicit values, norms and practices of a field and explores the 'tacit presuppositions of a field and for the taken-for-granted knowledge of social practice' (2013, p.378). Furthermore, 'the concept of

⁴⁷ For Bourdieu, 'The conditioning associated with a particular class of conditions of existence produce *habitus*, systems of durable, transposable dispositions, structured structures predisposed to function as structuring structures, that is, as principles which generate and organise practices and representations that can be objectively adapted to their outcomes without presupposing a conscious aiming at ends or an express mastering of the operations necessary in order to attain them. Objectively 'regulated' and 'regular' without being in any way the product of obedience to rules, they can be collectively orchestrated without being the product of the organising action of a conductor' (Bourdieu, 1990, p.53). *Doxa* are specific to the field as the 'system of presuppositions inherent in membership of a field' (Benson and Neveu, 2005, p.37).

the field or institution provides a means to simultaneously take into account external and internal forces shaping the news, as well as their complex interaction' (Benson, 2006, p.197). The professional field is a microcosm 'which is also a social universe, but a social universe freed from a certain number of the constraints that characterize the encompassing social universe, a universe that is somewhat apart, endowed with its own laws, its own *nomos*, its own law of functioning, without being completely independent of the external laws'; the journalistic field, which can be further split down into subfields, is an example of a professional field which acts as a microcosm within a wider societal macrocosm, obeying 'its own laws' (Benson and Neveu, 2005, p.33).

Crucially, this model allows for internal influences: 'what happens in it cannot be understood by looking only at external factors' (Bourdieu, 1998, p.39). While journalism is weakly autonomous as a field, 'one cannot understand what happens there simply on the basis of journalism, it is not sufficient to know who finances the publications, who the advertisers are, who pays for the advertising, where the subsidies come from...' (Benson and Neveu, 2005, p.33). The internal relationships are important too: 'Part of what is produced in the world of journalism cannot be understood unless one conceptualizes this microcosm as such and endeavors to understand the effects that the people engaged in this microcosm exert on one another' (2005, p.33). Recognising this homogeneity within the field can help explain pack or herd behaviour by the press.

Bourdieu's field theory also helps makes sense of seemingly contradictory or counterintuitive features of journalistic culture. For example, it may seem baffling that journalists competing for cultural capital in the form of original stories are, in fact, incredibly conservative in their treatment and selection of material (see, for example, Davies, 2008). As Bourdieu describes it, the paradox is that 'competition [between media organisations], which is always said to be the precondition of freedom, has the effect in fields of cultural production under commercial control, of producing uniformity, censorship and even conservatism' (1998, p.44). His schema suggests that

the arrival of new actors can either effect conservatism *or* transformation. High competition for employment can in fact make journalists more 'cautious and conformist', rather than adventurous and distinct in their style (Benson and Neveu, 2005, pp.5–6). The 'precarious' situation of short-term contracts 'implies a form of constraint and censorship', according to Bourdieu, who illustrates his point with the autonomous behaviour of *tenured* professors and teachers who took the side of the writer Émile Zola during the Dreyfus affair, a major political scandal in France in the late 19th century (1998, pp.42–44). It is easier to be autonomous when you are in secure employment. In this way, 'precarity of employment is a loss of liberty, through which censorship and the effect of economic constraints can more easily be expressed' (Benson and Neveu, 2005, p.43).

Brock offers another explanation for a journalistic tendency towards conservatism, despite the high value placed on the originality and independence in journalists' working practice. In fact, he argues, a sense of independence may have caused journalists to react slowly to the changing technological environment: 'the news business is inherently conservative because its practitioners are so caught up in the daily/hourly struggle...the importance of independence to journalists has meant a resistance both to change and to accepting advice (such as from software geeks)' (Brock, 2013).

This loyalty to traditional methods of practice provides an explanation for some parts of pack behaviour, adeptly and unforgivingly described by the journalist Nick Davies, even when the cultural rewards are oriented toward independence and originality (2008). Despite the journalistic prestige of the scoop and finding original angles, in practice it can be easier to pitch something in a familiar format and style to what has gone before, or is being covered elsewhere. This may be associated with legal issues, as will be discussed in Chapter Four, but also involves desk and commissioning editors' concerns

about the reception of the audience and media executives. This attitude limits the type of content featured and developed.

Beyond Bourdieu

Bourdieu's theory, which develops and goes beyond earlier structuralist explanations of social practice,⁴⁸ is useful as a foundation for comparative research about the outcomes of different media systems; as Benson describes it: '[b]y thinking through not only how fields or institutions tend to operate, but how systematic variations in their operations shape different news outcomes, we take a crucial step forward in our ability to analyse an increasingly complex news media environment' (2006, p.188). It is a step forward, but not a complete answer. One shortfall in Bourdieu's analysis is the limited recognition of social, as well as materialistic, motivations. Fligstein and McAdam argue that actors ('social creatures') are motivated by improving their position in the field, but do not treat everything as a 'zero-sum game'; they want people to think well of them: for this reason, they will 'cooperate in situations that do not necessarily benefit themselves' (2012, p.218). Another concern, voiced by Couldry (2003a), is that field theory alone does not 'account for the dynamic interrelationships between fields across social space' and the influence of social representations in one field on the actions of actors in another field. In his view, a more coherent explanation of media power is needed, which allows the use of concepts such as 'capital' and 'habitus' 'outside the context of specific fields of action' (2003a, p.10). Benson's concept of a 'mezzo-level journalistic field' in between micro and macro influences (2004) goes some way to address this inadequacy in Bourdieu's field theory. His development of a more fluid and inter-connected field, which recognises influences on journalistic practice from other fields, provides the useful point of departure for this thesis.

⁴⁸ For a more detailed discussion of Bourdieu's work in context, and his development and even transcension of more structuralist accounts, see Calhoun 2002a, 2002b.

Where are the internal and external influences shaping the characteristics of the field, and what are the relationships between fields? What sort of model would allow the flexibility to include a variety of actors and resources in a fast-changing digital media environment? First, much can be drawn from a Bourdieuan analysis of education policy (Lingard, Rawolle and Taylor, 2005), which considers 'cross-field' effects and a global education policy field, and separately, Fligstein and McAdam's model of 'strategic action fields' in which all fields are 'embedded in a dense network of other fields' (2012, p.203). Some of these theoretical observations, discussed in more detail in Chapter Seven, are relevant to understanding the cross-field effects of global and national fields of politics and policymaking, law and journalism. Second, this thesis suggests an even further departure from structuralism is needed to explain the interactions that enable – and deter – the publication of news. It is proposed that the notion of a 'news ecosystem' might provide a more useful way of conceptualising patterns of internal variation and similarity, while allowing for permeable sector or field boundaries, absorbing different actors and resources at different times, during a particular news event, or related news events (see Anderson, Bell and Shirky, 2012; Anderson, 2013b). This also allows us to 'see the global system first' and 'then make allowances for differences between nations and regions' (McChesney, 2001).

The news ecosystem

In the past few years - along with the idea of 'networked news' (Beckett, 2010), the 'networked information economy' (Benkler, 2006), 'spreadable media in a networked culture' (Jenkins, Ford and Green, 2013) and an emphasis on journalistic process as well as product (Jarvis, 2009) - the notion of a 'news ecosystem' has taken hold, with increasingly frequent references to the media ecosystem in reference to journalistic practice (Anderson, 2013b). In 2013, a workshop discussed how to 'map' the digital news ecosystem containing 'journalists, engaged citizens, and other information producers', with a blurring of the boundaries between producer and consumer, building on a body of literature and commentary from around 2006 (Domingo, Masip and Wahl-Jorgensen, 2013). For Gauntlett, the 'internet has not only become hugely important in

itself, but has forced all the media around it to change accordingly' and the media ecosystem described by Naughton in 2006 illustrates how the 'growth in new types and uses of digital media forces the whole media system to adapt' (2009, pp.148-149). Naughton (whose article is an indication of how much things have changed - he describes a blog as an 'online diary', a definition that seems overly simplistic in 2013) described how the news ecosystem, an idea he adopted from Neil Postman, 'will be richer, more diverse and immeasurably more complex because of the number of content producers, the density of the interactions between them and their products, the speed with which actors in this space can communicate with one another, and the pace of development made possible by ubiquitous networking' (Naughton, 2006, p.10).

More specifically, and reflecting the complexity of today's media environment, Anderson has analysed the 'manner in which news diffuses within the changing local journalistic ecosystem, focusing on both the movement and production of news, from within the newsroom itself' (2010, p.292); he suggests that past studies focus on the assembly of news and neglect the wider ecology, or, where they do look more widely, are limited to online textual analysis. For Anderson, 'going beyond the traditional newsroom ethnography in order to study the networks, organizations, social groupings, and institutions that populate the larger "news ecosystem" is obviously the first step in coming to terms with the shifting technological, cultural, and economic structures of digital-age journalism'. His interest lies in 'uncovering how fragments of linguistic and material facts diffused across the news network in the city'. This included looking at how these 'fragmented facts activated (or failed to activate) particular parts of the news network within and beyond the city' (2013a, p.4).

With this theoretical shift, there has been a marked, and encouraging, development in methodological techniques. As noted earlier, Wahl-Jorgensen has even suggested that 'the days of the newsroom as a central ethnographic location may be numbered':

We need to come to terms with the fact that (a) news production is increasingly taking place in and through virtual spaces, (b) news work is becoming increasingly decentralised, and (c) journalism is increasingly reliant on casual labor that is not tied to particular locations. (2009, p.33)

However, it may be more prudent to say that the definition of the material newsroom is changing rather than disappearing; while news production is undeniably more reliant on digital technology, the extent to which the work is *decentralised* needs further exploration through detailed comparative study. Additionally, it must be considered how different these work patterns are from what went before (Anderson, Bell and Shirky's study is a reminder of how recently some 'traditional' newsroom practices have developed (2012)). With this point in mind, media ethnographers like Anderson have recognised that there are important digital and physical interactions outside one organisation's newsroom that must be monitored as part of any serious study on the production of news.

This thesis will also take an ecosystemic approach, given that its aims include documenting the circumstances in which particular facts are disseminated, and more precisely, disseminated in such a way that they become news, or part of a scandal or crisis. To understand the notion of a chilling effect in England and Wales it is necessary to identify why particular facts activate, or fail to activate, particular parts of the journalism network within newsrooms, online and beyond the jurisdiction. Additionally, within his schema, Anderson includes a wide array of facts not limited to news 'stories'; he examines 'particular documents, interviews, links, algorithms, web metric software'. This wider inclusion of material is helpful, and goes beyond the subjectivities of the 'story' construction.

Addressing critiques of the news ecosystem concept

The appropriateness of the ecosystem as an analogy has been questioned. Miller and Maxwell, for example, note:

The media are undoubtedly important instruments of social cohesion and fragmentation, political power and dissent, democracy and demagoguery, and other fraught extensions of human consciousness. But talk of media systems as equivalent to physical ecosystems - fashionable among marketers and media scholars alike - is predicated on the notion that they are environmentally benign technologies. This has never been true, from the beginnings of print to today's cloud-covered computing. (Maxwell and Miller, 2012)

Their insistence that the concept is predicated on the notion that media are 'environmentally benign', or exactly equivalent to physical ecosystems, appears to be something of a strawman, however. With regard to its use here, it should be emphasised that the physical environmental impact of media technology is a separate issue and not considered for the purposes of this research. The conceptual media 'ecosystem' is merely a descriptive vehicle to explain social interactions and the flow of information within a particular jurisdiction, as will be explored in more depth in Chapter Seven. As Couldry has pointed out, drawing on Berger and Luckmann,

We cannot study media in isolation, as if they were a detachable part of the wider social process. The connections work in more than one direction. Media processes are part of the material world, yet we must also capture the force of the mystifications that media generate or, less pejoratively, their contribution to the 'social construction of reality' (Berger and Luckmann, 1968). Media, like the education system, are both mechanism (of representation) and source (of taken-for-granted frameworks for understanding the reality they represent). (Couldry, 2003a, p.1)

While not denying media's relationship with the material world it is the 'social construction of reality' that is the concern of this thesis. Miller and Maxwell argue 'the prevailing myth is that the printing press, telegraph, phonograph, photograph, cinema, telephone, wireless radio, television, and internet changed the world without changing the Earth' (2012). This thesis supports that argument, but suggests that it is possible to acknowledge the detrimental environmental impact of modern media technologies, while entirely separately using the ecosystem analogy to describe a set of social relations in a conceptual time and space. Using a metaphor to describe an object does not necessarily deny the existence of the object's real world relationship with the subject of the metaphor. Undoubtedly, working with analogies can be tricky. As Scolari acknowledges in his extension of the ecology metaphor, 'some biological laws and

principles do not allow a technological translation'. But, he says, used cautiously they can 'offer new insights and useful perspectives' (2012, p.218). Recent interpretations of the ecosystem avoid the accusations of technological determinism levelled at McLuhan, Postman and others who engaged in earlier versions of media ecology; Scolari's attention to 'interface', the 'place where media dialogues confront and contaminate each other' (2012, p.217) means, in his view, 'highlighting the complex dialectics between subjects, media, and social forces' (2012, p.219).

Perhaps more significantly, the news ecosystem can be easily criticised for its looseness as a term: is it any more precise than Manuel Castell's 'media space', criticised by Benson as too 'broad' a term to 'provide much theoretical leverage' (2004, p.277). The vagueness of the analogy is accepted, but it is the flexibility of the ecosystem concept that makes its use appealing. In Anderson, Bell and Shirky's report on post-industrial journalism they argue that 'the only reason to talk about something as abstract as a news ecosystem is as a way of understanding what's changed'. Their depiction of the ecosystem as 'aspects of news production not under the direct control of any one institution' is a way of explaining the development of freer forms of communication over a 15 year period, with the birth of the web. In their view, 'the best argument for thinking of news as an ecosystem is to help re-examine the roles institutions can play in that ecosystem' (2012, p.3). In this light, it can be seen as an extension of Bourdieu's professional microcosm, which more accurately depicts a current 21st century network. The ecosystem is an extension of the 'field' or 'microcosm'; but with more fluid boundaries allowing a rapid change of actors and the inclusion of non-human technology. Its conceptual purpose, described by Anderson, Bell and Shirky below, reflects Bourdieu's description of the microcosm, in its explanation of internal and external influences:

To talk about a 'news ecosystem' is to recognize that no news organization is now, or has ever been, absolute master of its own destiny. Relationships elsewhere in the ecosystem set the context for any given organization; changes in the ecosystem alter that context. (2012, p.3)

The authors reflect that there is no 'finished product from scratch'; indeed, 'we are each other's externalities'. Furthermore, 'every news institution is going to have to position or reposition itself relative to new externalities in the ecosystem' (introduction in Anderson, Bell and Shirky, 2012). While the authors acknowledge this is not an entirely new phenomenon, they propose that the 'explosion of sources and the collapse in cost for access has made the networked aspect of news more salient'. They do not specifically cite Bourdieu in their overview, but it is suggested here that the ecosystem is a helpful addition to the field concept, as a means of depicting a flexible network that allows the arrival of new actors and 'assets' at particular times and during certain events, from a variety of geographic locations:

[T]he current ecosystem contains new assets, such as an explosion in digital data and computational power. It also contains new opportunities, such as the ability to form low-cost partnerships and consortia, and it contains forces that affect news organizations, from the assumptions and support or obstacles produced by schools, businesses and governments. (Anderson, Bell and Shirky, 2012, p.3)

The model's flexibility is especially important because there are likely to be disagreements about who the relevant actors are (a report by the Pew Center for Research about the flow of the news ecosystem and 'how news happens' in Baltimore provoked a lively debate following publication - see Buttry, 2010; Pew Research Center, 2010). It is for the researcher to develop a suitable methodology with which to select relevant actors and resources for their purposes. It should also be emphasised that the 'post-industrial' news ecosystem described by the authors is culturally 'peculiar' to the US (Nielsen, 2012); many Western European media systems operate under different commercial conditions which should be considered when assessing news outcomes and legal conditions around the world.⁴⁹ While the ecosystem does not provide a complete explanation for the forces and influences acting on actors in their transfer of information, the idea of a changing 'networked news ecosystem' provides a useful

⁴⁹ This thesis about English law and journalistic practice predominantly draws upon two US conceptual imports: the chilling effect from media law and news ecosystems from media sociology. Nielsen's point can also be made about the cultural peculiarities of the US's legal system when using doctrine originating in the US to explain global phenomena.

framework within which to situate the journalistic interactions that lead to the dispersal of information. It pays attention to the specific mechanics of the network that leads to the dissemination of certain information at certain points of time (the activation of facts in Anderson's terms), but retains the flexibility for the arrival and departure of different actors and resources. For the purposes of this thesis, it is recognised as an emerging theoretical perspective and treated as an illustrative concept, rather than a full sociological theory comparable to Bourdieu's field theory or Actor Network Theory (ANT), say.⁵⁰ It is, in Scolari's terms, a 'descriptive model' for finding new questions and problems 'both at the macro and micro-levels of analysis' that can be coupled with other theories such as ANT (2012, pp.218–219). It provides another useful tool for comparative media research, exposing variance in characteristics within different types of news ecosystems around the world.

As well as developing broad frameworks for understanding editorial decision making, there has been extensive analysis of the factors that influence journalists in their daily decisions. This next section provides a review of two key concepts: news values and gatekeeping.

3.2. Conditions of the field

Journalistic field and news ecosystem studies suggest that there are specific and identifiable characteristics of news production, but what are they? What factors influence the transition of a piece of information to local, national or even global news? Addressing these questions is fundamental to understanding reasons for the *non-publication* of news and information, the broader aim of this thesis. As Daniel Bennett

⁵⁰ The introductory text for the ESF Exploratory Workshop on 'Mapping the digital news ecosystem' in May 2013 suggested that: 'An initial step towards a new theoretical framework is adopting the concept of news ecosystems (Anderson, 2011) to analytically embrace the diversity of actors involved in the production, consumption and discussion of current events...' (Domingo, Masip and Wahl-Jorgensen, 2013).

and I have previously argued,⁵¹ in an ideal journalistic process, newsworthiness of a story is defined by its relevance to the public interest and acts as a mechanism by which journalists 'objectively' select 'important' occurrences for publication from among any number of potentially newsworthy events (Molotch and Lester 1974, p.105). In practice, as will be explored in more depth below, the selection of news stories for publication has been shown to depend on a 'complex multifaceted gatekeeping process' (Clayman and Reisner, 1998, p.194): encompassing newsroom practices and routines (White, 1950; Golding and Elliott, 1979); journalists' access to 'newsworthy' information from their sources (Hall et al., 1978; Schlesinger and Tumber, 1994); the social organisation of the newsroom (Schudson, 1989, pp.270–275); and the culture and commercial interests of the audience (McNair, 2005, pp.28–29).

News values

An extensive body of literature explores the 'opaque' (Hall, 1973, p.234) and '(somewhat mythical) set of criteria employed by journalists to measure and therefore to judge the "newsworthiness" of events' (Richardson, 2005) although concentrating on news values may be more revealing about *how* news is reported rather than why it was deemed news in the first place (Harcup and O'Neill, citing Hartley, 2009, p.163). Harcup and O'Neill reviewed the most well-known and established set of news values presented by Galtung and Ruge in the mid 1960s and following a content analysis of their own drew up a new set of values,⁵² including the notion of news 'agenda'; that is 'stories that set or fit the news organisations' own agenda' (2001, p.279; and see Galtung and Ruge, 1965, p.67). Harcup and O'Neill conclude that while it is difficult to determine a hierarchy of values, 'certain combinations of news values appear almost to guarantee coverage in the press' (2001, p.276).

⁵¹ This section reproduces some of the content from a chapter co-authored with Daniel Bennett in 2012 (Bennett and Townend, 2012). My thanks to Daniel for his direction and assistance with setting out these ideas.

⁵² In 2001 Harcup and O'Neill set out an alternative set of values, suggesting that – with exceptions – news stories must generally fall under one or more of the following headings to be selected: 1. The power elite; 2. Celebrity; 3. Entertainment; 4. Surprise; 5. Bad news; 6. Good news; 7. Magnitude; 8. Relevance; 9. Follow-up; 10. Newspaper agenda (Harcup and O'Neill, 2001 p.264).

A taxonomy of news values is useful, but they must 'remain open to inquiry rather than be seen as a closed set of values for journalism in all times and places' (Zelizer, 2004, p.55; Harcup and O'Neill, 2009, p.168); 'further research is needed to measure the extent to which the above news values apply to other forms of media, in different societies, and how they may change over time' (2009, p.163). As Tumber has documented, changes in a journalist's situation, such as being embedded in their own country's military can make their 'professional values of impartiality and objectivity ... look wrong or misplaced' (2004, p.193). However, there are common criteria in most accounts of news values, 'which can be thought of as core or fundamental news values' (Greer, 2007, p.26).⁵³

The *doxa* of the journalistic field intersect with explicit news values, or vice versa. In an example shared by Willig (2013), a Danish journalist describes how she does not conform to a particular expected news value, 'exclusivity'. This value is not listed by textbooks as one of the main characteristics guiding Danish journalism⁵⁴ although it is recognised by Danish journalists as an implicit value. In this example, the journalist has described an expected 'deeply rooted' practice that she says she does not, in fact, follow. Any explanation of news practice must account for the dominant implicit as well as explicit values (Willig, 2013, pp.377–378) and furthermore, variance in perceptions and activities between actors and organisations. This includes any analysis of the legal factors affecting news practice and editorial decisions; they must be understood in the context of the implicit and explicit values of the news environment.

The activation of news

With the caveat that a bounded category of news is problematic to delineate, it seems fair to suggest that news presents a very selective and limited version of what is

⁵³ Greer mentions: drama and action, immediacy, violence, celebrities, and sex (2007, p.26).

⁵⁴ According to Willig, Danish textbooks and teaching have reproduced five formalised 'news criteria' – timeliness, relevance, identification, conflict and sensation – since the 1970s. However, she argues that these explicit values only represent some of the values influencing activity in the field (2013, p.377).

happening in the world. Media scholars have long recognised that despite journalists' representations, a very small sample of potential news becomes news; news events do not 'select themselves' (Hall, 1973, p.234). Furthermore, 'newsworthy' content, defined through particular values, does not necessarily become news (Shoemaker, 2006). Indeed, many items of news are 'pseudo-events' (Boorstin, 1962, cited in Curran and Seaton, 1991, p.266): 'activities whose only real purpose is to secure and control media coverage' (1991, p.265). News topics might also include 'media events' as defined by Dayan and Katz, 'great occasions - mostly occasions of state - that are televised as they take places and transfix a nation or the world' (1992, p.24) and scandals (see Tumber and Waisbord, 2004) but that list is not exhaustive.

News publishers publish a great deal of content that falls outside a commonly recognised definition of news: television listings, recipes and satirical columns, for example. News is socially constructed within the journalistic field and its subfields, subject to pressures and influences from other fields. If it is accepted that news values change situationally, then it can be assumed that the content and perception of news also changes over time, and by location. Indeed, as a result of the development of digital technology and shifts in patterns of consumption and distribution, the bounded category of news may become less distinct and pertinent in civic life. Furthermore, any understanding of legal influences on journalistic editorial decisions must look beyond news; defamation and privacy cases, and experiences relating to non-news content published by news publishers, influence their treatment of news.

With the fast development of digital news with new methods of production, aggregation and dissemination, liberation from limited formats of news might be anticipated; that the new guard of digital journalists and organisations should be able to shake free of journalistic *habitus* and *doxa* developed in large print-orientated newsrooms and shift the news agenda. The reality described by numerous studies on media agenda-setting

and media framing of events,⁵⁵ and from my own observations, is rather different. Domingo (2008) suggests a critical approach towards the myth of interactivity in journalism: despite changes in newsroom personnel and technology, 'references to traditional journalistic norms were still very present' in his study of online news practice at four organisations in Catalonia. Interestingly, this extended to the online-only operations as well. In his view, 'the professional culture of journalism is very prevalent and actually overshadows the strength and pervasiveness of the interactivity myth' (p.698). While his study did not extend to a content analysis, other studies have shown how traditional news titles and organisations still dominate the news market and field (see, for example, Curran et al., 2013; Fenton, 2009; cited in Barnett, 2009, p.8, 2012a, para.50).

Despite the proliferation of online networks and independent sites, it is still very difficult to achieve media publicity for stories that are not deemed news by the mainstream news publishers and broadcasters until there is such a movement in other spheres of activity that events prove impossible to ignore. Once a story is launched on the national news platforms, momentum gathers.

Of course, an assessment of material on the news agenda is based on researchers' own assumptions and methodology. Researchers tend to look at the prominence of content on mainstream and established news platforms to deem whether it has been judged 'newsworthy'. For example, Anderson's study of the 'Francisville Four' arrests in 2008, the aim of which is to examine the way in which news facts circulated in the shifting local news ecosystem, describes how a story about the arrest of local activists became news when it 'had gained certification by both of the major newspapers in Philadelphia and had produced a well-attended press conference' (2010, p.299). While Anderson's study of the 'circulation dynamics of the networked news ecosystem' includes a detailed

⁵⁵ For a helpful and deliberately neutral review of the literature on agenda-setting, media effects and framing, see Ofcom, 2012.

analysis of key digital actors that is missing in many studies, he assessed the news status of the story on its recognition by major newspapers.

Scholars are beginning to develop more sophisticated and wider-ranging ways of assessing trends in news (see, for example, De Nies et al., 2012),⁵⁶ but there is clearly more exploration to be done, and researchers must continually evaluate the markers and perceptions for newsworthiness and news agenda, questioning whether their measures accurately reflect the most prominent and influential *media and news-related* discussions (the separate but related question of public agenda and opinion is dealt with below).

Gatekeeper roles

Who are the key decision makers influenced by the values discussed above? Innumerable pieces of information are available each day with the potential to be transformed into news. Selections are made by specialised individuals and organisations with the control to turn these pieces of information into news, often called gatekeepers in the communication studies that have explored the underlying components that affect the production and promotion of content (White, 1950; Shoemaker, 2006; Laidlaw, 2010). The gatekeeper label has a practical as well as an analytical use: as Laidlaw has argued, 'the term gatekeeper not only serves a definitional purpose, but guides the nature and extent of their legal duties' (2010, p.263).

It is possible to isolate the role of individual journalists and editors as gatekeepers, and extend the description to new sorts of actors in view of technological and social changes. There is no great leap required to identify new digital gates and gatekeepers

⁵⁶ While the authors' paper discusses an automated technique for assessing the newsworthiness of a news article, a section on social media shows how trends might be systematically monitored on Twitter and Facebook; they note that these 'media act as a barometer for news trends' (De Nies et al., 2012, p.112).

(Laidlaw, 2010; Zittrain, 2006). However, while it is sensible to consider the role of internet service providers as news gatekeepers in contemporary studies, the transformative effect of new technology should not be exaggerated in the shaping of news (see Barnett, 2012a, para.50).

As White set out in 1950, gatekeepers play 'a most important role as the terminal "gate" in the complex process of communication'; by studying reasons for rejection of news stories 'we see how highly subjective, how based on the "gatekeeper's" own set of experiences, attitudes and expectations the communication of "news" really is' (1999). This chapter has already suggested that the 'newsworthiness' of content does not automatically lead to its becoming news; this can be partly explained by the role of individual gatekeepers. A definition of news must allow a degree of subjectivity: news is material that 'is judged to be newsworthy by journalists, who exercise their news sense within the constraints of the news organisations within which they operate' (Harrison, 2006, p.13; also see Harcup and O'Neill, 2009). These constraints might relate to the sources of the information, expected news formats and traditions of practice, and the physical or virtual organisation of the newsroom.

Shoemaker goes further still by questioning the assumption that journalists select the material they - or others - judge to be newsworthy, suggesting the newsworthy assessment is just one of many factors influencing editorial decisions (2006). She highlights the distinction between news, a commodity, and newsworthiness, a 'cognitive construct'; research has showed 'a disconnect between what people think is newsworthy and how prominently newspapers display the stories' (2006, p.110). Because of the human involvement in newsworthiness assessments, 'news is not necessarily - and may never truly represent - what is most newsworthy' (2006, p.109). This means that measuring the prominence of a story is not, in fact, a reliable way of measuring the newsworthiness of an event. Contrary to her earlier work, she states:

I now see that news is a social artefact - the stuff around the advertisements in television and radio news programs, in newspapers and in online media. In contrast, newsworthiness is a mental judgment, a cognition that can only marginally predict what actually becomes news. (Shoemaker, 2006, p.110)

Perhaps a reliable measurement of 'newsworthiness' can never be achieved, although this should not deter further examination of individuals' subjective perceptions, which may or may not influence what ends up in the news. Newsworthiness might be more accurately described as *collective perceptions of what should be featured in the news* - which is not necessarily what *will be* featured in the news, nor what people *expect* to be featured in the news. It is therefore sensible to follow Clayman and Reisner in paying attention to actual social practice as well as the content and prominence given to news,⁵⁷ a methodological approach that is taken in this thesis's consideration of the role of journalists, editors and lawyers in decisions to publish or abandon specific items, or particular avenues of inquiry at different types of publications.

3.3. External fields

As well as practice in relation to the journalistic field, as discussed above, the influences from external fields are important. Indeed, for Bourdieu, the journalistic field was particularly susceptible to external influences (1998). While categories of internal and external are not always easy to delineate, it is clear that 'extra-journalistic, organizationally driven considerations enter into the gatekeeping process' (Clayman and Reisner, 1998, p.197). This final section of the chapter looks at three major external influences: public opinion, the wider media economy and the law. It is suggested that while media sociological analyses of the journalistic field and gatekeeping practice have dealt with the first two factors in some depth, law and legal practice have not received a comparable level of scrutiny, especially in the contemporary digital environment.

⁵⁷ They emphasise the 'situated social practices' of journalistic gatekeeping, including the significance of the 'verbal assessments' made of story pitches at daily editorial conferences, as part of a 'social and collaborative process' (Clayman and Reisner, 1998, p.180, p.197).

Public opinion

The first external influence that has been considered extensively in media analysis texts is that of public opinion, distinct from the legally recognised public interest. The public is at the heart of media enterprise, primarily as content consumers, sometimes as paying customers - for Chalaby, this is a 'market of readers' that emerged over two hundred years ago (replacing a 'public of readers') (1998, p.184). A 'journalistic objectification of readers' desires' is a two-step process, 'whereby journalists first identify readers' desires and then project these needs onto their discourse'. The significance of this is that 'the ultimate referent of newspapers is not reality but readers' subjectivity' - not just based on journalists' personal beliefs, but the 'conscious and subconscious interpretation of readers' preferences' (1998, p.188). In this way, the readers play a crucial role, although it may not always serve individuals' best interests.⁵⁸

Members of the public also play a role as disseminators and contributors, with new opportunities for involvement through digital technology.⁵⁹ The public's interaction with journalism is central to the main journalistic codes (the National Union of Journalists, the Editors' Code of Practice, Ofcom code and the BBC Trust guidelines) as an audience and as contributors. While there *is* a distinction between the rights of the media and the wider rights of the public, it should be noted that journalists are also members of the public, and the membership of journalism can be fluid.⁶⁰ The public participate in journalism in a number of ways, as contributors and participants, as disseminators, as consumers and audience members. While the legal disputes discussed

⁵⁸ For Chalaby, the media holds a 'magic-mirror' which provides 'the comfort of knowledge without the substance', misleads people about their knowledge of, and their position in, the world (1998, pp.191–192).

⁵⁹ A range of literature covers the treatment of user-generated content (UGC) and the changing nature of contributions to the news process (see, for example: Thurman and Newman, 2014; Bennett, 2013; Singer et al., 2011).

⁶⁰ A recent definition offered by the UN Human Rights committee described journalism as 'a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere' (2011, p.11).

in this thesis involve the public in all three categories - with overlaps between each⁶¹ - it is the last category that is key here. What is the influence of the audience on journalism? How do journalists' perceptions of their audience and consumers affect the news that they produce? As Golding and Elliott identify, news values are partially shaped by the perceived 'importance' of the item to the audience (1979, p.117) and whether it will hold their attention, be of known interest, understood, enjoyed, registered and perceived as relevant (p.114; also see Harcup and O'Neill, 2009, p.165).

Journalists might *attempt* to establish the interests of their audience, but they often tend to publish stories that interest the newsroom and the editor (see Bennett and Townend, 2012). This is reflected in a comment by a former executive at the Mail, reported by the journalist Peter Wilby: 'The question asked about a story at the Mail ... is not "Will it interest the readers?" but "Will it interest the editor?"' (2014). Although it is commonly believed that the media reflects society because they want to serve their audiences there can be a 'remoteness' between producers and consumers (Curran and Seaton, 1991, p.267). With regard to popular television, Curran and Seaton discuss an interpretation that suggests:

The demands of the audience do not... exert any direct pressure on producers. Producers only have a vague image of those who watch their programmes. Yet they have a clear, if unconscious, notion of who they are actually addressing: well-informed, critical, professional people like themselves. (1991, p.167)

It feels too strong an assertion to extend to print and online platforms without specific empirical investigation, but it draws attention to an important tension between the media and the imagined audience. Furthermore, editorial decisions may be influenced by an 'audience ratings mentality' (Bourdieu, 2005, p.42), or, with the development of online news, an increased awareness of web analytics. Schlesinger and Doyle observe how at the Financial Times and The Telegraph, digital audience data 'has changed how

⁶¹ Some of the literature in this area discusses the role of what was 'formerly known as the audience', as members of the public take a more proactive role in news production (see, for example, Rosen, 2006; Gillmor, 2006).

stories are assessed for significance and duration and this has posed a new challenge to established notions of editorial judgement' (2014, p.17).⁶²

Consideration of the wider public interest *can* fall within a 'public opinion' category, but - as already discussed - it is difficult to define legally and socially; certainly its form and membership cannot be assumed in its social context:

In democracies, there is no universal 'public interest.' Rather there are numerous and changing 'interested publics' which fight battles issue by issue, in legislative corridors, regulatory commission hearings and ultimately at the ballot box. (Compaine, 2001)

The identity of the 'interested publics' and audiences that are influencing content is crucial to wider issues of democracy; as Cottle argues '[w]hose voices and viewpoints structure and inform news discourse goes to the heart of democratic views of, and radical concerns about, the news media' (2000, p.427). Despite the way arguments around civic engagement and rights are often articulated, the public or society is not a homogeneous mass with clearly defined media relationships and roles (see, for example, Feenan, 2013, p.8).

Despite the lack of uniformity and universality in civic voice and public interest, on a practical level journalists and scholars must engage with an abstract mass public whose identities are unclear, both in terms of deciding what material will interest the public, and what material is in the public interest. Clearly, the news media relationship with the public is two-way; as McCombs observes, the 'news media help to achieve social consensus, they do not alone determine what that consensus will be... The public and the news media are joint participants in the agenda-setting process' (1997, p.437). Undoubtedly, the media consumer has a greater role in the new media environment; for Jenkins, this is part of 'convergence culture', 'where old and new media collide, where

⁶² Several of the authors' interviewees at the two organisations stressed that while they were influenced by data analytics in their content decisions, a 'journalistic' approach was preserved: they did not consider themselves completely driven by analytics (Schlesinger and Doyle, 2014).

grassroots and corporate media interests intersect, where the power of the media producer and the power of the media consumer interact in unpredictable ways' (2006, p.2).

Care must be taken not to over exaggerate the effect of user interaction on news discourse and the public's influence and participation in political processes (an assumption made by Compaine, above; also see, for example, Turner, 2010). As Jenkins emphasises '[n]ot all participants are created equal. Corporations - and even individuals within corporate media - still exert greater power than any individual consumer or even the aggregate of consumers'. Furthermore, 'some consumers have greater abilities to participate in this emerging culture than others' (2006, p.3). Increased participation does not necessarily equate to a better and fairer society: Turner has questioned the presumption that ordinary people's representation in the media leads to a process of greater democratisation, suggesting that focusing on 'consumption, agency and interactivity seems to skew the debate once again in ways that distract attention from the larger structures which contain these practices and relations' (2010, p.120).

In summary, numerous texts have looked at the role of the public - as participants, audience and consumers - in order to understand the shaping of public agenda, and its contribution to democracy, with scholars discerning a distance between media perception and the actual needs and demands of members of society. This section of the literature unpicks the complexities and nuances of the impact of the public on media, challenging assumptions and empirically testing media claims. A similarly critical approach has been taken in relation to media economy.

Media economy

The second external factor examined here is that of the wider media economy, and the way in which the financial basis of a media organisation affects the type of editorial decisions taken. Like public agenda and opinion, it has received extensive scrutiny in

media production literature, in the way that particular ownership structures affect inter-organisational relationships and the flow of news.

Ownership and journalistic convention

Journalistic professionalism and norms of practice evolved as a response to concentrated media ownership, to provide an ideological distance between owners and editors (see McChesney, 2001). This system is imperfect, however; McChesney and others argue robustly that commercialism inhibited free, internally and externally plural voices, at the cost of the 'needs of the audience' (O'Neill, 2011). In fact, concentration of ownership reduces competition, restricting the breadth of debate and the number of shared views (Baker, 2002, 2007). For McChesney,

By most theories of liberal democracy, such a concentration of media power into so few hands is disastrous for the free marketplace of ideas, the bedrock upon which informed self-government rests. The key to making markets work in the consumers' interest is that they be open to newcomers, but the present conglomerate-dominated markets are not even remotely competitive in the traditional sense of the term. (McChesney, 2001)

That said, it should not be assumed that external competition between differently owned media organisations necessarily leads to diversity. As noted above, Bourdieu identified the paradox that competition between media organisations produces 'uniformity, censorship and even conservatism' (1998, p.44). Additionally, the constraining effects of commercial control are not necessarily overtly recognised as such,⁶³ or even if they are, not necessarily resisted by the actors within the system (see Freedman, 2015).

⁶³ One interpretation of this relationship between agency and structure is set out in Herman and Chomsky's propaganda model, which suggests that constraints (such as media ownership and advertising) can be naturalised, with actors apparently unaware of their lack of choice (2010, p.2). For some, this is an overly-deterministic account (see, for example, Schlesinger 1989), or even conspiratorial, though the authors argue it allows more flexibility than critics allow, and that any model is deterministic; 'the issue is whether it is useful in understanding and forecasting' (Herman and Chomsky, in Mullen 2009).

Media policymaking

Beyond the restrictions on editorial freedom, media ownership structures have arguably affected the media policy debate and eventual outcomes. It is a myth, McChesney suggests, that 'debates concerning media policy in the US have accurately reflected the range of public opinion and public interests' (2004, p.8). In fact, 'the media are political actors in their own right' (Curran and Seaton, 1991, p.1). As Freedman has argued convincingly, 'media systems are ... purposively created, their characters shaped by competing political interests that seek to inscribe their own values and objectives on the possibilities facilitated by a complex combination of technological, economic and social factors' (2008, p.1). Coverage of media ownership issues may be particularly vulnerable to interference that does not accurately reflect public sentiment, as Michael Cripps, a former commissioner of the US Federal Communications Commission (FCC), reflects:

While still a commissioner, I went one day to visit the editorial page editor of a major newspaper. I had noticed an editorial chastising the excesses of big oil companies, and I urged the paper to run a similar critique about the excesses of big media. The response I got was a negative shake of the head and an explanation that the editor had complete freedom to cover any issue - except one. That issue was media ownership. I nearly fell through the floor at this stark admission, but then I realized that the explicit statement I had just heard only validated what I had been experiencing. (2014)

Cripps is unconvinced by the argument that the public was not interested in structural media questions and concerned that this uncovered beat left US citizens without a 'clue' about media ownership rules (2014). For McChesney, the public played 'almost no role whatsoever' in the development of late 20th century media systems, thanks to the dominance of 'corporate-insider hegemony' (2004, p.8). Following these authors, this research proceeds on the basis that media actors with commercial interests have played an instrumental role in the development of media regulatory and legal policy in the UK, skewing the debate at times.

Micro-level media economies

Understanding the constraining - or enabling - effect of commercial media has to be assessed at a ground level as well; for Herman and Chomsky, it 'requires a macro, alongside a micro (story-by-story), view of media operations' (2010, p.2).⁶⁴ At the micro-level then, attention must be paid to budget cuts, as well as other constraining commercial factors such as advertising and ownership influence. The newsroom budget's is crucial in shaping news output: 'budget constraints mean that managers are far more often focussed on financial control than winning professional recognition' (Harcup and O'Neill, 2009). The constraining effect of tight budgets has led to a form of 'churnalism', with regular cutting and pasting from press releases, without robust techniques for verifying or gathering new material (see, for example, Davies, 2008). The neologism itself, popularised by the investigative journalist Nick Davies, has been attributed to Waseem Zakir, a former BBC journalist, who told Tony Harcup,

Ten or 15 years ago you would go out and find your own stories and it was proactive journalism ... It's become reactive now. You get copy coming in on the wires and reporters churn it out, processing stuff and maybe adding the odd local quote. It's affecting every newsroom in the country and reporters are becoming churnalists. (Slattery, 2011; originally in Harcup, 2004)

Commercial news criteria are likely to inhibit the production of news; for Allern, the 'more resources – time, personnel and budget – it costs to cover, follow up or expose an event, etc., the less likely it will become a news story' (p.145, 2002). Additionally, a desire to build audiences and act in the interest of investors and sponsors can lead to 'junk' journalism, partial and distorting, according to McManus: 'In routine coverage, market journalism affects news production ... producing two kinds of distortions, those of omission of newsworthy information and those of inclusion of the non-newsworthy' (1994, pp.190-191).

⁶⁴ In their view, this exposes 'the pattern of manipulation and systematic bias' (Herman and Chomsky, 2010, p.2). Given the restricted empirical data available and fairly limited access to the legal-editorial process, this thesis does not attempt to test this theory, nor does it frame media selectivity and omission in such strong terms.

These macro and micro financial pressures have to be seen as part of a bundle. As Judith Lichtenberg eloquently describes it:

... we know that the press in its most characteristic modern incarnation - mass media in mass society - works not only to enhance the flow of ideas and information but also to inhibit it. Nothing guarantees that all valuable information, ideas, theories, explanations, proposals, and points of view will find expression in the public forum. Indeed, many factors lead us to expect that they will not. The most obvious is that 'mass media space-time' is a scarce commodity: Only so much news, analysis, and editorial opinion can be aired in the major channels of mass communication. *Which* views get covered, and in what way, depends mainly on the economic and political structure and context of press institutions, and on the characteristics of the media themselves. (Lichtenberg, 1990, pp.102-103)

While digital channels of communication have changed the boundaries of space and time, they have not removed the constraints imposed by economic and political structures. Indeed, as Nick Davies' research suggests, a digital desk-based existence may have contributed to the inhibition of certain types of journalism (Davies, 2008; drawing on research by Lewis et al., 2008). 'Publishers' need to make money' has limited diversity of expression according to Schudson (2011, p.192). Perversely, limits on governmental intervention in the US have made media organisations 'more vulnerable to the censorship of the marketplace' (2011, p.192). In Schudson's view, a strong role for the state (in the form of the publicly funded BBC, for example) can in fact counter market censorship.

While Schudson finds market censorship a greater threat to diversity of expression than governmental censorship in the US, it is arguable that both can limit expression in different ways. Inhibitory commercial pressures may co-exist with legal pressures, although it should be noted that concentrated commercial ownership might in fact help challenge legal threats or undesirable governmental interventions. As Benson has identified:

... large, profitable media companies have more resources to devote to reporting and for legal defense, thus making them potentially more willing and able to challenge the state, powerful interest groups, or other large corporations. In some cases, then, concentration or even local

monopolies may actually contribute to more critical, in-depth political reporting. (Benson, 2004, p.282)

Additionally, critical assessment of the independence of the protected state-supported media is needed. As will be shown in the case studies in Chapter Six, a pattern of omertà or collective silence extended well beyond the print commercial media, to the BBC and other public service broadcasters (PSBs). These PSBs are also part of a national media pattern of selective reporting; with commercial limitation just one of the many threads within a complex web of influences.

Law

There is a notable scholarly interest in ownership, but assumptions are often made about the influence of concentration of ownership within media systems,⁶⁵ according to Benson (2004, p.285); given that there is even less thorough analysis of the law in practice, the same could be said for the way that legal threats are often reported in media and academic analyses. As Fligstein and McAdam have noted, there has been neglect of detailed and systematic study of external actors such as 'the state'; such influences are acknowledged but without 'systematic theory' of the relationship between single 'strategic action fields' and state and non-state fields (2012, p.203). Literature on the effect of state and commercial funding in different media systems and on media production often mentions state law and its supposed impact (see, for example, Hallin, 2004), yet there is very limited detailed sociological or political analysis which examines the role of law and lawyers on media and news practice.

As a result, the chilling effect and the assumptions upon which it is based have received inadequate academic scrutiny (with notable exceptions already noted in Chapter Two; see Schauer, 1978; Kendrick, 2013). There is potential for further analysis in the context of media systems analysis; government or political constraints have been under-scrutinised in the literature, Benson notes (2004, p.281). He makes his own

⁶⁵ He points to 'the growing suspicion that concentration of ownership explains much less about media content than previously believed' (2004, p.285).

assumptions when he says that 'censorship needs little explication'⁶⁶ but acknowledges that the 'the "chilling effect" ... *probably* varies depending on the force, regulation, and timing (pre- or post-publication) of the censoring acts' (my emphasis) and sows the seeds for further analysis and unpacking of the chilling effect concept:

Government regulations, particularly via legal definitions of defamation and libel, may crucially shape patterns of news coverage. In particular, we might suppose that more restrictive defamation and libel laws will contribute to lesser public discussion of the private lives of government or other officials (Saguy, 2003, p.93), and perhaps less critical and cynical coverage. Likewise, stricter laws and regulations concerning journalistic access to confidential government information are likely to contribute to fewer revelations about governmental corruption or mismanagement. (Benson, 2004, p.282)⁶⁷

Further examination of the precise way in which libel law, and the protection of the private lives of individuals, played a role would be useful here; Benson is sensibly tentative in his suggestions about the legal impacts, as indicated by the cautious language used in the excerpts above, and, in later work (which will be re-visited in Chapter Seven) when he asks: '[h]ow can it be that tougher French state regulations as well as the soft power of its state subsidies do not dampen the amount of criticism in the press, as the U.S. First Amendment absolutists would probably predict?' (Benson, 2010b, p.16).⁶⁸

Legal gatekeepers?

The effect of law and regulation is mentioned in some of the most prominent editorial gatekeeping studies and indeed it is used to explain the role of digital information regulators (Laidlaw, 2010). However, the specific role of media lawyers, law and regulation (and importantly, perceptions of law and regulatory frameworks) has been

⁶⁶ Conversely, I suggest that this term is imbued with multiple meanings and could do with far more explication of the type at which Benson excels.

⁶⁷ Saguy, cited here, identifies a number of reasons for the assumption that the French press is less likely to report on the private sex lives of politicians than their US counterparts, including 'greater legal restrictions to certain kinds of information and by more broadly drawn libel laws prohibiting personal criticism of political officials' (Saguy, 2003, p.93).

⁶⁸ He adds that 'It may be that this "kept" French press is a watchdog that barks so much only to hide the fact that it would rarely actually bite (though again, the willingness of the U.S. press to "bite" should not be exaggerated)' (Benson, 2010b, p.16), but this is not a wholly satisfactory explanation.

surprisingly neglected in the literature on editorial gatekeeping and news values. There is clearly a need to look at how lawyers fit into what Clayman and Reisner describe as the 'social process of gatekeeping' (1998 p.172); this is what is attempted in the next chapter, which will look directly at the *editorial* gatekeeping role of lawyers and related legal and regulatory frameworks.

3.4. Conclusions

This chapter has set out key theoretical ideas around the journalistic process and the factors that influence production and publication of material and the gatekeeping process, scrutinising the notion of 'news' and 'newsworthiness', norms of practice and news values developed in the field, and the influence of the public and socio-economic structures. It identified that journalists might be influenced by an organisation's or their own agenda in the production of news, as part of a complex web of other factors. Attention must be paid to macro-level political and economic structures, as well as the micro-level 'characteristics' of media organisations that influence the flow and inhibition of ideas (see Lichtenberg, 1990).

While there are specific norms of practice that develop within the journalistic professional field, it is important to recognise cross-field effects, and variation between different types of organisations and individuals; this requires development of, and some departure from, Bourdieu's explanation of social structures and agency. The flow and development of news can only be explained through a very malleable model, which pays attention to continually shifting relationships between actors, organisations and news objects. The appeal of the ecosystem framework, emerging in recent journalistic scholarship, is that it allows flexibility in describing journalists' intentions, actions and reflections and fluidity in the number and type of platforms and actors, while emphasising the significance of what actually takes place (for example, the type of information that is actually transferred from place to place, and the size and nature of the audience it reaches). The boundaries of an ecosystem are not fixed: it might explain

how a news organisation operates in relation to its competitors, or with online commenters.

Within this literature on media systems there is, however, one area that cries out for more empirical investigation: law and regulation. Legal structures do receive some attention in the literature on ownership (see, for example, Curran and Seaton, 1991, pp.361–371; Baker, 2007, pp.229–230), but not using the approach advocated by Clayman and Reisner, 'in action' at the level of the 'social process of gatekeeping' (1998). Research at this ground level has neglected the law: Anderson's work, for example, does not pay much direct attention to law and regulation, which this thesis suggests is an important factor in shaping editorial decisions.

Helpfully, the chilling effect literature discussed in Chapter Two has looked at the legal processes involved in journalism, and Kenyon and Marjoribanks in particular (2008a) have drawn upon media sociological theory and methodologies to examine the influence of defamation law in the news process. Nonetheless, the effects of law on journalism have received nothing like the academic attention on other types of effects: the 'assumed' effects of media on audiences for example (McQuail, 2010, p.416) (for a review of literature, see Iyengar, 2010).

This thesis strives to extend this scholarly exercise, further interrogating the chilling effect concept through the theoretical models of the journalistic field and the news ecosystem, by considering the two-way interaction or relationship between law and journalism (beyond the impact or effect of law on journalism). Legal decisions, where they can be delineated as such, are made in a wider social context. As the section on news values and gatekeeping indicated, there is never one simple answer for why a story is rejected. It may be a combination of formally recognised 'values', intersecting with an implicit logic of practice. It is possible, however, to attempt to isolate those reasons and examine their basis. The next chapter will look specifically at law and

lawyers – in action as part of the 'social process of gatekeeping' (cf. Clayman and Reisner, 1998).

4. Legal gatekeepers: Their role and views

News Ed: Have you legalised the splash?

Lawyer: I've made a few cuts.

News Ed: There's only four words left!?

Lawyer: Including the byline.

(‘All the best quotes from the newsroom’, @ReverseFerret on Twitter, 2014)

Just as editorial decisions are not made on the basis of neutral assessment of the newsworthiness of a piece of information, legal risk is not calculated in a vacuum from the rest of the newsroom and the outside world. Furthermore, law is just one factor in a web of competing influences, including ownership, journalists’ employment conditions, and the anticipated public and newsroom reception. In media and scholarly analysis of the impact of the law, typified in simplified descriptions of the chilling effect, assumptions can be made about causality, neglecting to account for the wider social context in which decisions are made. This next chapter explores in detail the role and experiences of lawyers in news and media environments.

Lawyers as gatekeepers

One interviewee, a specialist barrister who regularly acted as a ‘night lawyer’ at newspapers (YH),⁶⁹ made the unprompted suggestion that their role was primarily as ‘gatekeeper’.

I see my role as a gatekeeper, to let everything through that is defensible and to only stop things where I think we will get sued if we publish that or this [where] a court will find against us on this. So [at one national newspaper] ... probably 50% of the time, I don’t make a single change to the newspaper – everything goes in as it was written.

⁶⁹ As explained above, interviewees have been anonymised with a code [Y plus a letter]. See Appendix Three for a summary of their roles.

This may not seem a particularly controversial observation to make; yet lawyers' role in the gatekeeping process has been given surprisingly little attention in the academic literature about newsroom and legal practice. It is similarly ignored in legal practitioners' texts and discussion as well. As Price notes, 'pre-publication advice is undoubtedly the most important part of the defamation process, but probably the most neglected' (2001, p.377). While numerous texts exist for journalists making legal decisions pre-publication (notably the journalists' 'bible', McNae's Essential Law for Journalists, now in its 22nd edition; see Dodd and Hanna, 2014), legal literature aimed at lawyers tend to focus on post-publication litigation (their legal bible is Gatley on Libel and Slander, by Parkes et al., 2013). Robertson identifies 'newsroom obeisance to the night-lawyer's credo, "If in doubt, take it out"' (2013), but is this a fair generalisation?

There is scope to explore the role of the lawyer in the newsroom, drawing on online and media accounts, case judgments and semi-structured interviews with lawyers. As will be set out in more detail, in-house and external lawyers are at pains to emphasise that they *do not* play an editorial role in the news process. A clear binary between legal and editorial advice is an important part of the professional structure and legal basis of the role but, as this chapter will show, the line is not always so clear in everyday interactions. While lawyers tend to see themselves as outside the central editorial process, they inevitably influence editorial processes and approaches to stories, and on occasions, the handling and wording of the story. This is *not* to suggest they breach professional standards governing their advisor role, but that a role in the social process of editorial decision-making can be played within regulated professional structures. It is a symbiotic relationship, with the ethos of the publication and the sense of being part of a team influencing the lawyer's approach, in turn.

4.1. Professional structure

This section gives an introductory overview of the key players and roles in the legal gatekeeping system before examining some of the practices and processes in more depth.

In-house

Large media organisations have control systems in place to safeguard them against legal action, involving in-house lawyers and even whole legal teams. National newspapers tend to employ at least one full-time editorial lawyer, with many employing several on this basis in different roles – some newspapers, for example, have a member of staff to deal primarily with regulation (the Press Complaints Commission until recently) and related complaints. The only national newspaper with a developed internal ombudsman system at the time of research⁷⁰ was the Guardian and Observer, with two Readers' Editors and supporting staff, to handle editorial complaints which may, or may not, overlap with legal matters. Although other newspapers have employed ombudsmen or readers' editors in the past, at other titles this role appears to mainly be taken by the managing editors or in one case a 'feedback editor'. This contrasts with the US, where it is far more common to have a full-time 'public editor' or ombudsman to oversee complaints and liaison between journalists and readers. According to the readers' editor of the Observer and president of the Organisation of News Ombudsmen (ONO), the system has not been widely adopted in the UK because 'editors get jittery at the thought of a loose cannon in the newsroom' (Pritchard, 2012).

National newspapers also employ specialised 'night lawyers' (who generally have other jobs as well) to check copy shortly before going to press; this is known as libel reading but the issues are much wider – another shorthand term, 'legalling', is perhaps a more accurate description. Observational research and interviews indicated that newspapers normally employ one or two freelance night lawyers per shift. In 2003, Wade estimated that there were around 40-50 employed on this basis at national newspaper titles in London: 'Once on duty, their primary concerns are with defamation, reporting restrictions and contempt of court – specialist areas of law that they must know inside

⁷⁰ More newspapers may introduce such a system in the new regulatory environment; in September 2014 the Financial Times, which has not joined the new self-regulatory body IPSO, announced it had appointed a new editorial Complaints Commissioner 'to support the FT's existing framework for handling editorial complaints, independent of the editor' (Financial Times, n.d.).

out ... [a] shift usually starts at 5pm and should finish by around 9.30pm; after that, a night lawyer is on call for any late-breaking news or queries for as long as necessary' (2003a).

Despite technological developments which allow round-the-clock publishing, with journalists often able to upload straight to a blog or content management system from home, my research suggests that this night lawyer routine is still followed at national newspapers in the UK, with the publication of the printed paper providing a focal point in the legal process. Some interviewees had clearly spent time reflecting on the ambiguities and complexities of online publishing and the implications for legal decision making; others seemed less concerned and more traditional in their approach, focusing on the printed publication and seemingly relaxed about journalists filing copy straight to the web or via social media accounts associated with their job title. This is quite surprising, particularly because online as well as print publications have been the subject of recent libel and privacy actions, and online publication was a primary concern in the campaign for libel reform which led to a specific clause in the Defamation Act 2013 that deals with the nature of online publication (the introduction of a single publication rule, which is designed to limit claims to the standard limitation period of 12 months). Newspaper brands may attract more libel claims than individual bloggers because of their perceived power and influence but this is not restricted to their printed content. Court litigation involving news media has tended to be primarily concerned with print or online articles, rather than social media postings, such as tweets, or user comments underneath articles. This may change over time; perceptions of influences on public perception of reputation are not static.

External counsel

External lawyers may play two roles, in an advisory capacity pre-publication or resolving post-publication disputes. Some of the barristers and solicitors interviewed had regular clients for pre-publication (colloquially referred to as 'pre-pub') checking work. Many magazines and online publications without in-house legal counsel pay a

retainer for this type of service. Some media companies also have special relationships with particular law firms for work beyond the capacity of the in-house legal team. But the work and clientele is varied for both media specialist barristers and solicitors. Interviewees had often experienced both claimant and defendant work during their careers, although some had more regular work on one side than the other. This is particularly marked at solicitor firms which specialise in either defendant or claimant work. One interviewee said it was their firm's policy not to act for any claimants bringing claims against media companies, although they might act against different types of defendants – for example, for the claimant in a dispute between individuals. This was different from the firm's approach in the past and marked a change in its direction. While barristers are subject to the cab rank rule (Bar Standards Board, 2014, pp.43–44 rC29), which requires them – subject to a few exceptions – to accept instructions regardless of the identity of the client and the nature of the case, it does appear that some do more claimant work than others (and vice versa) and of course, specialise in certain legal areas. This is, of course, dependent on the cases in which solicitors choose to instruct them, which is why barristers become specialised in certain types of work or clients. There is a third category of lawyer too, the solicitor advocate. Like other areas of law, solicitor-advocates are qualified to play an advocacy role in place of a barrister although they are not subject to the cab rank rule in the same way.

The interviews with specialist barristers and solicitors covered their 'pre-pub' and advisory/litigation work, where relevant. As discussed in the methodology, these semi-structured interviews covered key themes, but questions were not fixed nor always in the same order. They tended to be conversational in tone, with the interviewee mentioning a view or example, which I would follow up with further questions connected to that point. The areas broadly covered included: background and experience in defamation and privacy; work routines and practice; general views on legal processes and policy, focusing on defamation and privacy and including issues such as alternative dispute resolution and costs; impressions of the chilling effect; and

finally, monitoring defamation and privacy actions and thoughts on collecting this type of data. The latter category tended to provoke defensiveness or bemusement so I usually left this line of questioning until last. I prepared tailored questions for external counsel and for in-house roles, although did not stick to these rigidly, preferring to explore the points the interviewees raised. Additionally, some respondents offered experiences from roles previously held.

4.2. Work practices

Pre-publication activity

This next section explores the findings under each theme, and explores key ideas that emerged, namely that lawyers' pre-publication routines in-house and to a lesser extent, out of house, demonstrate the crucial role that lawyers play in editorial decision-making.

Timings

As noted above, in-house lawyers' daily routine reflects the traditional patterns of the printed press, although they now publish around the clock. Gillian Phillips, director of editorial legal services at the Guardian, has described how, '[o]nce upon a time, you knew you would publish at 6pm or 7pm and you had a deadline,' ... 'Now there are none of those constraints, no taking it slowly – everybody wants to be out there first' (Waller-Davies, 2014). Despite this significant change in the daily timetable, national newspaper routines are still scheduled around the print timetable, although material is also published online throughout the day and often before it appears in the paper – it is not uncommon for the Guardian's Saturday magazine lifestyle content to appear online on Friday afternoon, for example. In-house lawyers might attend morning conference, along with key members of the editorial team. This, one in-house lawyer, YB, said, helps the lawyer 'know from the beginning of the day what is on the agenda':

Obviously the agenda changes as the day changes, but we're able to advise if we see something that we think might be problematical or we go and talk to the reporter ... or to the desk, and say

... 'we think this could do with an early look and make sure you get a right of reply from this person'.

Night lawyers are still employed on a freelance basis to do the evening shift of last minute checking before going to print, taking over from the regular in-house lawyer who tends to leave early evening. Some of the in-house lawyers indicated, however, that they would expect to remain on call in the evenings and weekends. In-house lawyer YI, for example, said: 'Any journalist knows the doors are open 24 hours a day: weekends, evenings, night times, they can contact me. Holidays, 24/7, 365 days a year. I haven't had ... an undisturbed weekend for about 12 years'. Another in-house newspaper lawyer, YN, said that anything major should have been dealt with during the day, but that 'the remit of the night lawyer is to be a night lawyer so if something comes up during the evening ... they make a decision'. But if the in-house lawyer was not available and a decision had to be made, they would be able to seek external advice (in this newspaper's case, from specialist barristers):

We will always back the night lawyer saying 'I couldn't get hold of you and I felt it was an important matter and I went to counsel'. In terms of the overall cost it's actually tiny compared to the cost of something going wrong.

Geography

There are particular issues with national newspapers extending their operations to other jurisdictions (for example, the Guardian in Australia and the US; the Mail Online in the US), but the jurisdictional focus of newspapers appears to be shifting for its UK publications as well. As one participant in my survey of journalists observed (see Chapter Five), a national newspaper journalist in the UK may not necessarily expect to reach a predominantly UK audience any longer; it could vary from piece to piece. For in-house lawyer YJ it was the experience of being sued for libel overseas which changed their view:

I did take the view, that if we're safe here [in the UK], we're safe everywhere, apart from those funny little laws we don't know about, which we're not going to know about but we'll know about

if they come and bite us ... since my experience with [overseas litigation] I now have alarm bells ringing ... back in the day, it was Russian oligarchs: every time you saw them in copy [you were] conscious, they're going to sue here. So you just make sure we're airtight here, no-one's going to sue in another jurisdiction. But since my [overseas litigation] experience I do now think more [about other jurisdictions] and also I do actually have a concern from a privacy perspective in France.

This worry about claims *brought overseas* contrasts with a more common concern of 'libel tourism' *within England and Wales* – the notion that English courts attract claims from around the world as a result of libel claimant friendly conditions.⁷¹ For example, John Micklethwait, editor of the Economist, told the Evening Standard in 2011, 'We publish in 192 countries around the world. We do not check libel law in any other country except here. That's all you need to know' (Spanier, 2011). To some extent this view – which I sometimes cited in my questioning – was supported in the interviews, in which people mainly spoke about their anxieties around English law, when asked about the most pressing issues. But the mood may be changing in a more globalised environment. According to the Guardian's Gillian Phillips, 'We publish everywhere and the legal test is that if you are downloadable somewhere then that is akin to publishing in that country ... We have been threatened with action in Pakistan and Zimbabwe. We have been sued in France, Greece, Italy – you cannot possibly know all of the laws in all of those countries. You have to take informed judgements and get external legal advice.' Nonetheless, she maintained that the UK is 'one of the most restrictive publication arenas' (Waller-Davies, 2014).

In-house role

There are strict codes of conduct governing the way that an in-house solicitor or external counsel can give advice. According to the practitioner textbook by Price,⁷² they offer advice – not censorship:

In common with all professionals, lawyers give advice and clients make decisions. It is particularly important to bear this in mind when giving pre-publication legal advice. An editor decides what appears in a newspaper or magazine. A lawyer merely advises on risk and the likely

⁷¹ The evidence for this perception is discussed at greater length in Chapter Six.

⁷² Its most recent edition is also co-authored by Duodu and Cain (2010).

consequences. He may warn that publication is highly likely to lead to an indefensible libel claim and the damages will be punitive, but he should never tell the editor that he cannot publish. The decision is the editor's who may resent being told otherwise. It is his prerogative to publish an outrageous article without proper evidence – perhaps calculating that the increase in circulation justifies the risk of litigation. (Price, 2001, p.378)

The roles and duties of the in-house and external counsel discussed in this chapter are rarely given much direct attention in libel judgments (and some communication between lawyers and journalists, such as 'legal marks' (annotations on the text), would be protected by client privilege).⁷³ A rare example is found in *Christie v Wilson and others* [1998], a civil appeal deciding whether the solicitor David Price should be barred from acting for the appellant (a journalist defending a libel claim brought by the athlete Linford Christie), because of his role working for the appellant at a pre-publication stage. The judge at first instance had found that Price, in the process of giving pre-publication advice to his client, the magazine *Spiked*, had in effect made the decision to publish, basing the decision on the client's memo to WH Smith, which stated:

Please bear in mind that the copy you are about to read is pre-publication. In other words, it has not yet been legally read. A copy is with the eminent libel lawyer David Price at this moment, who will read every word before we go to print. Naturally, his advice will be strictly obeyed, and he can provide a letter stating legal clearance prior to distribution. (*Christie v Wilson and others* [1998])

In an affidavit cited in the judgment, Price quoted from his own book to explain the advisory rather than editorial role of the lawyer. The appeal judges disagreed with the original decision, deciding that it *was* a matter of discretion for the editor to publish, despite the wording of the memo and that Mr Price had not transgressed an advisory role. This professional and important dichotomy between advice and editorial decision-making was firmly emphasised by internal and external lawyers throughout my interviews.

According to in-house lawyer YN,

⁷³ See, for example, discussion between Justin Walford and Leveson LJ, 9 January 2012 (Leveson Inquiry, 2012a, p.28).

I think it's very difficult as an in-house lawyer because you're reporting to an editor and you are there employed by the company. But I think that you have to have an attitude which is that you're exactly the same as any outside lawyer. So you just give advice in exactly the same way, hopefully clear and hopefully correct advice as to what to do and what not to do. The role of the lawyer is that. It's not to take part in the creative process. I'm not sure I could take part in the creative process: I don't think I have the necessary skills and talents anyway. It doesn't matter whether I did or didn't. The role of the lawyer is to give legal advice.

In some ways the in-house role was no different to an outside one, in YN's view:

You could imagine that a local newspaper would not have an in-house lawyer, they would simply work with an arrangement with a firm of solicitors whereby if they had a problem they could email it through. And someone will give advice. I don't think the advice from an in-house lawyer is – in a sense – really any different. I think it's the same process. Because there's an awful lot more advice to give [at a national newspaper] it's much more convenient to have an in-house lawyer.

Others also emphasised the advisory role. In-house lawyer YI said 'I am an advisor. Ultimately, it's the job of the editor to decide'. There was, however, a strong line of communication between the in-house lawyer, the editor and the management:

I just walk in [to the editor's office] and we'll have a chat if I want to take instructions from him, or he'll email me. I've got a constant line of communication ... I'll just wander up, or email them [the management]. My line of instruction is straight to the top if I need to. Ultimately it's their decision. It's his [the editor's] paper.

Naturally, there is discretion on the part of the in-house lawyers and night lawyers as they check copy; they choose which issues to raise, but they were clear that this was a legal not an editorial role. As journalist – and media lawyer – Alex Wade has observed,⁷⁴ it is 'rarely a good idea' to let their own internal writer or editor surface, 'champing at the bit to tweak the inelegant and fix the infelicitous' (2006). Night lawyer YH said their role was to 'stop unlawful things'. 'You do get some people who literally correct grammar ... people go through correcting spellings and things like that' but, in YH's view, 'that's what the subs are there for'.

⁷⁴ Wade has written entertainingly and insightfully on life as a night lawyer in a number of articles for the Times and other publications (see, for example, Wade, 2001, 2003a, b, 2006).

From my own observations of a weekend shift at one national newspaper, the freelance lawyer carried out routinised and specific duties, but was part of the team and consulted frequently throughout the shift, as well as engaging in general conversation about media legal issues and at that time, the ongoing debate around the future of press regulation. Clearly, the lawyers are part of the team and not expected to 'act in a vacuum', as Louise Hayman, former legal manager at The Independent, has put it: 'They're [night lawyers] part of a team and I expect them to consult not only with journalists, but also with the in-house legal team as and when there are problems' (Wade, 2003a). It is likely to be this team spirit that attracts some people to the role, rather than financial reward. For night lawyer YH, the attraction was not the money, especially as they progressed from the junior bar, but the atmosphere and sense of productivity. As a barrister, time in court is actually quite limited: 'we sit there in our rooms on our own in front of our computer screens for eight, ten hours – we might have a chat to the clerks, or our neighbours, but that's about it. But we don't really see anyone'. This compared to the camaraderie of a national newspaper: 'It's quite nice to go to a news floor and have a buzzy atmosphere and think I am actually contributing to a positive product that's coming out tomorrow. Rather than arguing about defamatory words and things like that'.

There may be a collegiate role for the lawyer – and the interviewees' language reflects this (they refer to the publication as 'we' and 'us') – but the professional role, it was repeatedly emphasised, has to be strictly advisory; their role is not to hit the publish button. Nonetheless, the views and practices of lawyers inevitably influence the way that content is produced – and, indeed the manner in which material is amended or cut. While lawyers were firm that there was a strict separation between advice and editorial decision-making, it is evident from my interviews and other sources, that at publications with legal resources, lawyers are deeply embedded in the social process of

editorial gatekeeping, a 'vibrant process' as in-house lawyer YN described it and will be further shown below.

Relationship with journalists

In over simplified accounts of newsroom practice, the editor's or journalist's relationship with the lawyer is portrayed as antagonistic. This appears, however, to be exaggerated. In the shifts I observed, journalists were keen to seek the lawyer's opinion and view on content. Equally, the lawyers interviewed assumed legal knowledge on the part of the journalists, with an expectation that reporters or desk editors would bring relevant items to the lawyers' attention.

In-house lawyer YB, who had worked in several newsrooms over the years, enjoyed a 'particularly healthy and collaborative relationship with our journalists and it's one of the reasons I'm really happy to work here and have decided to devote most of my energies to working here'; because of the types of issues the newspaper covers (their journalists are not interested in sensationalist content, for example) 'there isn't a huge amount of conflict between the legal department and the editorial'. This was aided by a 'proactive' approach: 'we try and help avoid the problems before they even begin. And I think people ... are very receptive to that actually. I'd say it's a very collaborative atmosphere that we work in. I don't know if they would say the same, but that's certainly my perspective!'

In-house lawyer YN described how news editors, or features editors acted as 'agents' to communicate with: 'I think you need to be flexible as a lawyer – you need to listen'. He or she needs to understand the main point the journalist is trying to get across: 'The lawyer needs to pick that up, needs to be aware of it and needs to say "I see, well lose that and that, or change that, we need to bring this out more, so you can balance it up", and that's the most helpful legalling there is'. Furthermore, it is not wholly about getting a story in the paper; for YN:

People say a good lawyer is a lawyer who gets a story in a newspaper. I'm not sure that's right. I think a good lawyer is a lawyer who tries to work with the journalists and the editors to understand what is the key part of the story they want to get [and the] information they want to get over and how to do that, in the best way. The most legally appropriate way, so it's not just a matter of saying yes. Or no. It's a matter of saying, 'well right, this is how you've done it but ... why can't you do it like this?' And them saying, 'hmm, we can't do that, so you say, well, what about like this?' And they say 'we could do that, we could lose that bit' ... so it becomes a process. So everyone legalises in different ways. To me this is the single most important thing.

Night lawyer YH said that occasionally there was disagreement over a suggested change, but that was part of the night lawyer role:

...Sometimes there is [antagonism]. But sometimes you'll suggest a change and somebody will come up to you and want to know why you're making it, and suggest that it's wrong and that you don't need to do that. Or if you've removed an allegation, or toned down an allegation they'll come and say 'well, look, here is all the evidence we can back this up. Leave it as it is.' Well, ok, then fine ... obviously from our perspective as night lawyers [it is] far better for us to have been a bit over-zealous and tried to tone something down that didn't need it and then have a discussion about it than let something go through and then get criticised for it later.

In-house checking process

According to descriptions by interviewees, the libel reading routine tends to vary between papers, but with the greatest attention given to news and then anything contentious arising in features or sport. The technology and news flow varies between titles, which can affect the lawyers' role, in terms of how changes are made to copy, and how the checking routine is organised. Traditionally, the lawyer would make 'legal marks' to an item in print, or on screen, and the changes will be accepted or rejected by desk or sub-editors for the final version. At the Leveson Inquiry, Justin Walford, in-house counsel at the Sun, described this process thus,

Having discussed the case with an editor or news editor or whatever ... a copy is put into the machine and one then simply types out 'delete this' or 'add that' or a note to the subeditor: 'For Pete's sake, don't do X'. (Leveson Inquiry, 2012a, p.28)

Some of these would be 'legal musts':

Or very often, one puts certain paragraphs and one says, 'These are legal musts', or one says at the top of the copy: 'For goodness sake, balance this out', or: 'Don't just run ...' Invariably the copy is much longer than the story that appears, and what you don't want is the other side of the person's [response] – right down at the bottom, just gets lost or cut out. It's not deliberate but it happens, and it's things like that that – those are the legal marks that would be made, sir. (Leveson Inquiry, 2012a, p.28)

Naturally the online publishing flow has changed this at some titles, with journalists at some titles publishing straight to web, and sometimes bypassing traditional sub-editing stages – when live blogging, for example. This was not of great concern to one in-house lawyer, YI. Despite the different approach to sub-editing, web journalists would know to draw something to YI's attention before setting it live: 'They will still send the controversial stuff to legal in the same way'. Furthermore, the lawyers are on call throughout the day and night: 'The web know they can contact us 24 hours, seven days a week. We get stuff through on Blackberry... they can call us. We just have to be available. From about 1.30, 2am to 7am you don't get much through: we don't have someone monitoring the screen at that time of night. But if they had to, if there was an emergency they can call us. Stories that come through after that; invariably there's nothing to it'. That was partly because of the provenance of the stories, YI said; they would be straightforward items coming from the wires.

Most national newspapers in the UK have separate teams trained to handle and moderate user comments underneath articles; this would not be something the lawyers would usually be involved in on a day-to-day basis. Nor did journalists' individual social media arise as a specific topic of conversation (although it should be noted it was not one of the main interview questions). From general discussion of routines and concerns, the focus still seemed to be on full articles, whether for print or online.

Some in-house lawyers were more reflective about changes brought about by digital technology than others. One, YJ, was interested in the question of timing a right of reply request – in line with the requirements of the Reynolds defence for responsible journalism, a form of qualified privilege, now to be replaced by a more general public

interest defence in the Defamation Act 2013⁷⁵ – and spoke at length about how digital and mobile communication alters the cultural norm of how long to give someone to respond to an allegation:

In terms of a right to reply, I think the actual real difficulty is on timing ... in this digital era everyone wants to get their information up as quick as possible. How long do you give someone? ... This is one of the ones that is not really tested in the court.

The Reynolds defence recognises the need to publish 'perishable' news but this is difficult to establish in a digital era as well, according to YJ. As part of a digital first strategy, 'you're asking yourself, how perishable is it? Are you the only one with the information? Well, I am now. But if someone tweets the fact that something, it's gone viral, in which case I'm not. It's a ... really sensitive area'.

In-house feedback loop

In YJ's view, the issue and uncertainty around the timeliness of news and getting a right of reply was 'not a pressure on the legal department but it's a pressure which the journalists feel which you then can then feel as it filters down, saying "I'm keen to get my story up"'. This relationship between journalistic and legal processes is crucial. Although lawyers must maintain their professional role as advisors rather than editors, they inevitably pick up on journalistic needs, and vice versa. This two-way relationship is also part of the social process of editorial gatekeeping.

There was lack of clarity in the way that information was fed back to journalists, however. Daytime and staff in-house lawyers described how they conversed and discussed issues with journalists, but at the libel reading 'night lawyer' stage the interaction with sub-editors and desk editors is fast-paced and not particularly discursive, according to night lawyer YH, '...it's not generally feeding questions back; it's generally take this out, change this to this ... They want it done. They don't want to have

⁷⁵ The Act came into force on 1 January 2014, although some cases will still be able to be pursued under the old law until the end of 2014.

to sit there and [me] say "well, back in 1895, it was decided that..." They need practical advice'. The subs would definitely be aware of changes, YH said, but was unsure if the authors of the text – the bylined journalists – would be aware that legal changes had been made after they went home:

I don't know that it does feed back to them... I don't know how much care the journalists take going through their copy the next day to see what, if any, changes were made. The problem is, I would expect, even if they do see changes they're not going to know whether that's something the sub did or whether it's something done for legal reasons. I suppose if there were major changes made then it would probably be explained to them. (YN, in-house lawyer)

However, YN, an in-house lawyer, described how 'I don't like to make a set of legal marks on your copy and not speaking to you about it. I don't like you waking up tomorrow morning and finding your story has been savaged by me. You might not be there because you might be out of the office'. On significant stories, they would go up to the news desk to speak to the news editor or the deputy: 'We'll try and get a balanced view about what it is we want and what they're trying to say and negotiate over certain paragraphs and if you put that in, well, we need that in'. Then it would be a case of speaking to the subs and making sure 'they understand we've put that in, this goes in, and that headline needs to have an inverted comma around it – and things like that':

It's a balancing act really ... so you get at least what it is they're trying to get across. That's absolutely essential. I think that that's something which you can only find out if you go up and speak to them and listen to what they're saying and discuss it. And that's where it's a sort of vibrant process... it's not simply a process where you write your story and you give it to me and I could be 500 miles away and make a set of marks and send them back. I don't think that really works. I think it works on some stories but it is a process of talking to them. Trying to agree that, well if you do that you need to do that. So it's a balancing act. I think that's a process which needs a face to face discussion.

For in-house lawyer YI it is vital that journalists understand the recommended changes: 'As far as I am concerned, what the journalist writes is gospel, we have to get it into the newspaper. Every word they write. Because the words is their job. So when we're changing those words... We're changing what they're saying, so they need to understand what we do'. After legal has made 'marks' to copy, 'we encourage the journalists to come and argue about them. So I'm very happy if the journalist wants to come and say...

why have you done that mark? Why have you done this? Sometimes they'll provide you with information which makes you take the marks out'; on other occasions additional marks may be added.

Journalists' legal knowledge

According to night lawyer YH, sub-editors do not always have good levels of legal knowledge and understanding, despite extensive experience in the role: 'Some of them have been there an awfully long time; [they] still don't really understand the laws of contempt and will say can we say that or not? The answer is often obvious'. However, investigative journalists with long experience, 'people who write regularly on contentious topics' had a good level of legal knowledge. 'The ones you've got to look out for are [people] who don't usually do a serious story ... or small items, sometimes'.

In-house lawyer YI was confident that journalists had received a good level of legal training before entering employment at the newspaper. 'I have the presumption here that all journalists have been on some recognised journalist training course, where law for journalism is an important part'; they said, adding that often journalists 'will know what the legal principles are even before they come to me'.

Picking up on in-house lawyer's YJ's observation that lawyers had to be increasingly aware of law in other jurisdictions, I asked whether journalists were adapting to that, as well. While it was a 'fascinating question', YJ was not sure to what extent other jurisdictions would be covered on journalism education and training courses. However, earlier in the interview, it was emphasised that the newspaper's investigative journalists had a good grasp of English law; they 'know what they're doing and they're very experienced ... they know what they need to do in order to try and rely on a Reynolds defence'.

In-house lawyers mentioned existing training programmes and briefings that would communicate legal developments to journalists. YN said that post-Leveson there would be 'a lot more training':

There will be a structure of training which I think will end up quite impressive... You as a journalist going into a newspaper group, or a broadcaster, will find you are regularly given training, regularly in discussion groups, about public interest and where it lies...

In-house: other legal issues

While the interviews mainly concerned defamation and privacy-related law, interviewees were asked what the most pressing legal issues were, when undertaking pre-publication checking. For night lawyer YH, the main issue was 'libel, and then contempt, then privacy is quite low down. On an average day'. This seemed to be a similar pattern among lawyers working in-house and from my observation of two weekend shifts with a night/weekend lawyer. Privacy was generally interpreted in relation to misuse of private information and breach of confidence, with little to no mention of data protection law because of the journalistic exemption under S32 of the Data Protection Act 1998.⁷⁶ The criminal law was not discussed in any detail, although interview questions did not directly address it. It was clear that contempt had become a bigger focus with the incumbent Attorney General's bullish approach to perceived breaches.⁷⁷ Privacy had obviously become a more extensive, although not dominant, consideration with the development of case law (which contrasts with the empirical findings of Barendt et al.'s study in the mid 1990s, which dealt primarily with libel) although some lawyers emphasised it did not affect quality or broadsheet papers in the same way as red-tops. Copyright was mentioned a little, but not extensively.

⁷⁶ Since the interviews took place, data protection and the 'right to be forgotten' has become a much more pressing issue for news publishers, in view of the European Court of Justice decision in May 2014, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014], and subsequently, Google's voluntary removal of links to some news articles which have been the subject of complaints (which it alerts journalists to).

⁷⁷ At the time of the interviews this was Dominic Grieve QC MP, who was replaced by Jeremy Wright MP in July 2014.

Pre-publication: libel

With regard to libel, the lawyers had to consider not just whether a statement is defamatory, but whether it is defensible. Additionally, they had to read the texts carefully to identify any likely complaints. In-house lawyer YB described how one had to be alert to 'subsidiary or satellite figures in a newspaper article, who might inadvertently end up being involved, or end up being featured in a defamatory way'. For regular in-house lawyers, the pre-publication activity would involve procedural advice, as well as copy checking. YJ described how journalists were aware of the in-house code and would flag up potential issues at an editorial level first, 'then they'll come and see us and depending what the issues, or they think the issues are, and how far down the process they are, and raise concerns or discuss with us what they think they're aiming to do with view to getting some legal input'. They will explain what they are intending to do and there is a 'discussion that goes on between us and then it's elevated if necessary to editorial level...'.

The Reynolds defence for responsible journalism was mentioned frequently. In-house lawyer YJ suggested its influence was perhaps under-recognised because it has helped *prevent* legal action and threats, with the publication's defence strengthened if they had sought a right of reply prior to publication. Although only a few cases in court have relied on a Reynolds defence (suggesting that it was not all that useful or prevalent as a defence), YJ's view was that the defence had a far wider effect in everyday activity and helped deter claims: 'Are there only a couple of cases on Reynolds [because] it is so successful that actually no-one sues on it? This whole idea that the courts upheld Reynolds again; how great it's still on the record; well, actually no, this is a day-to-day thing and the fact that no-one sues on it is because once you've put the allegation to them, and once you've done this, you've airtightened it. You sit back and let it go'; the defence was helpful, but 'unquantifiable' in terms of the impact on publishing. Nonetheless, YJ suggested that often no post-publication action was taken following an initial legal contact, if a journalist had put the allegation to the subject ahead of

publication. For in-house lawyer YB, Reynolds provided 'a road-map, in its blueprint form' and they frequently reminded journalists of its worth. Night lawyer YH suggested that:

The Reynolds defence is just a godsend for [journalists] and you know as long as you're taking a fairly balanced tone – the main allegations, you've got some evidence for them, you've put the story to the source, to the individual who's the subject of the story, you're going to be fine.

However, it would be less relevant for the types of titles that deliberately cast someone as the villain of the piece and were not concerned with creating a balanced news piece, in YH's view.

Pre-publication: privacy

The pre-publication approach to a story with privacy issues is different because the right of reply would provide no defence. Additionally, lawyers have to consider whether an injunction would be sought by the subject if prior notification was given; as discussed in Chapter Two, pre-publication injunctive relief is easier to obtain on privacy rather than libel grounds.⁷⁸ According to in-house lawyer YN, privacy has been a big change, whether for 'right or wrong'. Following the Campbell case [2002, 2004], the law 'really radically started to change':

What was permissible, what could be written without legal problem changed very rapidly. So I think, probably in the area of privacy, in the last five, ten years there's been a massive change, massive. ...[I]f you got hold of any, particularly Sunday tabloids, 10, 12 years ago and compared them to now, I think you'd see they are very different newspapers. Legally what could be published 10, 12 years ago, can't be published now. It's not a question of it being right or wrong. It's a fact. That's what's happened.

For a solicitor working solely on defendant work, YP, 'privacy has overtaken defamation in the last ten years ... most of the stuff that most of our clients want to publish has got a privacy angle. The defamation side is actually quite easy'. The key questions for YP were: 'What is it? Where was it? Is there a public interest in publishing it? And if there

⁷⁸ Although some stories may be at risk of libel and privacy action, making the pre-publication path especially tricky to navigate.

isn't really, would they sue?'. However, despite this perception of privacy as a growing problem, the law does not necessarily prevent certain types of publications from publishing material about private lives because of the way the 'celebrity and paparazzi market actually works in practice', YP said:

.... you have an awful lot of C-list and occasionally A-list celebrities who want to feature in the papers. It isn't actually that difficult for a celebrity to have quite a high degree of privacy unless they're doing something genuinely wrong ... you look at the magazines and you see the same people again, again and again and it is absolutely true that they tip off their favourite photographer: 'I'm going to be here at such and such a time, you can come along and take some pictures and put them out'.

Night lawyer YH pointed out that if certain newspapers always listened to the argument that something would be an invasion of privacy 'half of it wouldn't be published'. The newspapers are *not* worried because they know 'that most of these people want the attention':

If these people were worried about it they'd be suing left, right and centre and they're not. It's only the odd one. Sometimes you can say this is a privacy concern and it's likely that they're going to do something about it because they've complained before, or this is a particularly touchy subject, or something like that. But often if it's just the fact that it's a story about their private life with no public interest element, they generally go ahead and publish it anyway.

The inconsistency between a. the view held by some interviewees (for example, YP) that privacy is a growing concern and b. the fact that privacy does not seem to lead to more actions or complaints than defamation, can perhaps be explained in this way: for some lawyers, privacy is now the more troubling and difficult issue because of its ambiguities in law and practice, although not necessarily the legal issue that gives rise to the most actions.

As noted above, however, French privacy laws were of particular concern to several interviewees engaged in pre-publication work. Night lawyer YH said: 'Any sort of French celebrity, not that there are many, really, that we would write about in the English press, but any sort of French celebrity: you're less likely to publish the beach

shots, the nightclub liaisons, that sort of thing. Because you're worried about French law coming along ... getting criminal convictions.'

Pre-publication threats

In-house lawyers described getting legal warnings from subjects of stories that did not result in a formal complaint, which might be described as empty threats. One in-house lawyer described how they had received 'pre-pub' letters warning that a journalist has been in touch over a particular matter. The information is then published by the publication but there is then no complaint letter in response. It would be interesting to compare 'the number of pre-pub twitchy letters you get, and from that, the number of complaints', it was suggested. Anecdotally, I was also told of journalists getting threatening letters from solicitors for little end and, it was suspected, simply to accumulate client bills (also see findings in Chapter Five). In contrast, external solicitors have emphasised that it would be very rare to send a warning letter and not to follow it up. It is, however, very difficult to substantiate the conflicting claims made by defendant and claimant lawyers in the absence of any formal records. Additionally, it is necessary to be specific about different types of letters and outcomes: their format and whether they have been issued before or after publication, and the reason they have not been followed up (it could be that the final version of the article is deemed defensible). If data on the volume of letters and their effect were available, any analysis would have to take into account these different types of warning letters and outcomes.

Post-publication activity

The lawyers interviewed were generally positive about the mechanics of the in-house process and, if they had them, did not share misgivings about the system although some discussed ambiguities in law in relation to their decision-making. This contrasts with the view given by Price, who argues that the system is skewed toward post-publication work and libel claims could be avoided if publications invested in advice from higher-qualified lawyers at an earlier stage:

'A stitch in time saves nine' and many libel claims could easily have been protected by minor changes to the copy before publication which would not have neutered the story. The thousands of pounds incurred in subsequent litigation would have been saved. The system is topsy-turvy. Young barristers, often with little experience of libel, are entrusted with the position of pre-publication adviser to national newspapers at hourly rates a fraction of those charged by litigators. In contrast, the cream of the profession spend days in court arguing over the results of what may have been a few minutes' advice from a legal novice in the heat of the newsroom. (Price, 2001, p.377)

Whether or not this view is correct (my research indicated that many night lawyers are very experienced and capable), it is certainly the case that hundreds of thousands, if not millions, of pounds are spent by newspapers each year in court and in out of court settlements, and dealing with post-publication activity is a major part of their in-house teams' work. While separated for the purposes of analysis here, it is clear that decision making at pre and post publication stage is closely related. When talking about pre-publication decisions, interviewees would often relate it to litigation experiences – either their own or reported cases.

Type of defendants

Defamation news is still dominated by national print media, despite a proliferation of online media often publishing without legal advice and checks.⁷⁹ Several interviewees talked about claimants' tendencies to sue traditional media brands, particularly newspapers, from which they were more likely to recoup costs or reach a settlement. Additionally, 'there's the argument that a newspaper site is worth more than a blog in so far as it's a trusted site', according to in-house lawyer YJ. This was to do with the claimant's perception of the impact of the brand: if it is read on a newspaper or broadcaster site, 'someone's filtered that information, or it's going to have slightly more of an impact than if you read it on someone's blog'. The content could be the same on both: 'it's effectively the same thing but in a different form. People will still go for the newspaper because it's a trusted organisation'.

⁷⁹ This is partly to do with news interest in such cases; in fact, many defamation claims that reach court do not involve media or journalism and are between ordinary individuals.

Perversely, it seems that the *presence* of editorial filters can in fact encourage litigation in certain circumstances. This was also perceived by journalists and publishers who felt that by having insurance they might attract more claims (see Chapter Five). While lacking the protection of in-house lawyers and the money with which to defend claims, independent sites can be seen to give themselves a legal buffer by having *fewer* filters in place and therefore lower credibility. However, it is difficult to substantiate perceptions such as these, in the absence of solid, rather than anecdotal, information about claims threatened against bloggers and independent writers in comparison to claims threatened against large news organisations; it may be that action is initiated at a preliminary stage although it does not reach court. It is therefore not systematically documented anywhere.

Libel and privacy complaints

Although the perception was that privacy is an increasingly important issue, interviewees working for quality or broadsheet newspapers were keen to stress it was not a major issue for them. Nonetheless, they recognised it as a growing editorial pressure. In-house lawyer YI described how 'the new trend is to complain about privacy', but then added that the publication would get more defamation complaints despite the current climate. This was echoed by YN who worked for a newspaper that *does* run regular stories about private lives, but said 'most post-publication complaints curiously enough ... are probably not privacy complaints, they tend to be defamation complaints. That may be because we've got it right before publication. Most defamation complaints tend to be because you've made a mistake; you've got it wrong'. Also, a potential complainant might feel that the damage is already done and a successful claim would not provide enough compensation for the hassle of pursuing a claim. Certainly, since the Ministry of Justice began recording the number of privacy injunctions in 2011 they seem to be decreasing, with no new applications recorded in the quarterly report for January to June 2014 (see Chapter Six for the full data).

Outcomes of complaints

Records were not made available to me, and not necessarily systematically stored, about the number of complaints that led to actual litigation. YN estimated that around one in ten complaints turns into litigation:

[T]he vast majority of legal complaints are resolved pre-litigation, you couldn't litigate them all. You wouldn't simply have the money. And also, I don't think there is a desire for many complainants to litigate. Many complainants simply want the matter put right, and closed ... and they feel hurt and they want something for that and they want to resolve the matter much more quickly. They don't want the prospect of the next 18 months of their life to be involved in litigation with a newspaper group. There are better things to do in life.

Of those that do not proceed, there were a number of potential outcomes, said in-house lawyer YN:

Some of them go away. Some of them you beat them off and they go away. Some of them [you] will resolve by way of a correction and an apology; some of them will be a payment of damages; some of them will be a payment ... maybe a private letter; a payment towards costs. Each one will be different. And each one stands or falls on its own facts. Some people complain and they basically want a private letter or apology and the matter removed from the internet. Some people want a full-blown statement in open court... every single case is different.

In situations where the complaint did proceed to a formal claim, the in-house team and external counsel play a role in deciding whether to try and settle a case, or defend it. According to YN, this is contextualised in the organisation's operations more generally.

The point is that just because there's Article 10 litigation, or it's public interest ... doesn't mean that commercial issues don't arise. We're no different from any other commercial organisation – we're here to make a profit. [If it costs] to litigate matters of principle, you're obviously going to think long and hard about those principles and whether it's necessary to litigate them.

In other words, the company has to consider its commercial duty to shareholders, as well as the importance of defending rights protected under Article 10.

It is a business decision that would involve the managing editor and other executives, according to another in-house lawyer YI: for the management to decide whether to fund it and for the editor to decide 'if it's a case he wants to fight'. In terms of the financial

decision-making, 'It's relevant; it's always there in the background, but to me that's not the most important thing, it's the principle, the principle at stake'.

I'll look at the complaint on its merit. If it's something that can ultimately be settled on a commercial basis with all the parties going away happy, obviously we'll consider going down that route.

On certain types of public interest stories, however, YI would want to defend a case as a point of principle.

The other side's approach naturally affects whether a case can be settled or not. One interviewee suggested that there are occasions on which one of the parties wishes to settle, but the claimant lawyer drags the process out. There is a slight conflict, they suggested, when lawyers in private practice bill by the hour, although it is said they act in the client's best interest. Involving lawyers in a complaint adds an 'extra level of difficulty'; simultaneously, the media organisations will be trying to make their position defensible which detracts from actually trying to resolve the complaint.

In-house regulation and ethical processes

As noted above, very few newspapers have in-house ombudsman style systems, as are in place at quality titles in the US, often known as 'public editors'. Some interviewees were not convinced that they would deter legal complaints, or were not sure how such a system would work in practice, with one interviewee concerned they would simply add a 'layer of bureaucracy'. Another said it was difficult to see how a non-legally qualified member of staff could resolve a claim for damages, although there were occasions he had resolved a legal complaint through the Press Complaints Commission procedure.

Internal ombudsmanship can however form a significant part of the legal process: in evidence to the Leveson Inquiry, Chris Elliott, Guardian readers' editor, said that his newspaper estimated that 'legal costs are down by around 25 per cent a year since the inception of the office because we are able to offer prominent redress more quickly'.

Following an internal adjudication, fewer than a dozen complaints a year go to the Press Complaints Commission and 'rarely end in a threat of legal action' (Leveson Inquiry, 2012b para.30, p.8).

One interviewee described how the legal process might not always address the concern of the complainant. A non-legal approach can be more effective. This is a view shared by a campaigner, Jane Fae, over the treatment of transgender people in the media. She has argued that 'what is needed is not more regulation but culture change and a respect for the rules already in place':

To that, I'd personally add a much more streamlined process: less quasi-legalistic quibbling by some papers on nit-picking detail; more basic humanity. It is ludicrous that it can take just 20 minutes to publish an inaccuracy, and three months to remove it. (Fae, 2013)

This position might seem sensible, but is clear that lawyers make a clear differentiation between legal and ethical issues when dealing with content and process for very pragmatic reasons. In this way, legal systems can determine particular patterns of behaviour that do not always reflect wider social definitions. For example, a 'particular and limited version of truth ... established by evidence in a juridical process' does not necessarily match a journalistic version of truth, according to research by Kenyon and Marjoribanks (2008b, p.7) indicating the 'emergence of a disjuncture between journalistic and traditional legal understandings of truth, impacting on what speech can be reported in the media without running the risk of legal liability in defamation law' (2008b, p.8).

A similar disjuncture with ethics can be found. What might seem a straightforwardly *ethical* approach (i.e. removing or amending an alleged inaccuracy) might not necessarily correlate with the sensible *legal* approach if it makes the newspaper's legal position less defensible (acting too hastily before a full and final settlement has been negotiated). Likewise, at a pre-publication stage, it might seem sensible to pre-moderate user comments underneath articles on ethical grounds but there is wide

consensus (although not properly tested in court) that a post-moderation comment policy will give publishers greater protection under English law (see, for example, *Kaschke v Gray & Anor* [2010]). The paradoxical overlap and professionally necessary distinction between law and ethics was neatly articulated by in-house lawyer YN:

You're not really there to advise on ethics, you're there to advise on the law. So I mean the fact that the law and ethics go together hand in hand is obviously welcome but at the end of the day it's the legal advice that's needed. Clear legal advice. So what I privately welcome is not part and parcel of the job.

4.3. Policy opinions

The in-house lawyers quoted above, and external solicitors and barristers specialising in media law, held strong – and often varying – views on the substantive and procedural law surrounding defamation and privacy based on their professional experiences. These connect to their own formulations of the chilling effect and the effects of defamation and privacy law on freedom of expression. Most interviewees appeared to accept that defamation and privacy related procedures *could* deter legitimate expression in undesirable ways and the costs were too high, but there was not general consensus about the extent to which this occurred and the way in which systems should be designed to reduce this phenomenon. Furthermore, some interviewees raised concerns about the power exerted and responsibility taken by newspapers, impinging on the rights of the people they were writing about. This was not surprising given the context in which the interviews were taking place, with media practice under scrutiny in the Leveson Inquiry proceedings.

At one end of the scale, a solicitor acting mainly for media defendants (YM) argued that their 'personal view is that greater protection should be given to freedom of expression', that it was not necessary to weigh reputation equally against competing rights. For YM, reputation should not be a protected right under Article 8:

... I personally do not approve of the use of Article 8 as a way of according equal protection into reputation and freedom of expression. I think freedom of expression ... should weigh more

heavily in the scales... Personally I would like to be in a situation closer to that in the US where there's constitutional protection for freedom of expression and reputation plays second fiddle to that.

On the other hand, another solicitor in private practice (YG) said that media organisations were the beneficiaries of high costs and uncertainty in the law, for example, around the Reynolds defence and the public interest:

The people who are therefore going to suffer from that most are *not* the newspapers; the uncertainty of the law works in their favour because the claimant is the one who has the choice: 'am I going to sue or not?'.

It was clear, however, that most interviewees thought a simpler and cheaper process to resolve disputes would be of benefit to claimants and defendants; the effect on their own professional business was not a major discussion point, although they often commented on the commercial concerns and motivations of other professionals. One, recommending that more could be made of ombudsmen and non-legal processes to resolve disputes more effectively, joked that they would do themselves out of a job.

Substantive and procedural law

Defamation

In the time since the interviews took place, the Defamation Act 2013 has become law and is now in force for all new publications from which causes of action arise (the old law can still be used for publications made prior to the Act's enforcement until the end of the limitation period). Interviewees were divided as to its potential efficacy: namely, whether it will introduce more confusion and complexity (see Mullis and Scott, 2014) or ameliorate the process with benefits for defendants' freedom of expression (see Harris, 2014). Particular issues addressed, although they will not be dealt with in detail here, included the introduction of the single publication rule which means that actions against online publications have to be brought within a limitation period of 12 months from the date of original publication (as already applies to printed publications), a new

defence for internet intermediaries, a public interest defence to replace Reynolds, and the removal of the presumption for a jury trial.

Privacy

The question was not specifically raised, but no one independently mentioned a specific desire for an English privacy-related statute (beyond Article 8 in the Human Rights Act 1998). General points were made about the vagueness of European and English case law, however. In-house lawyer YN observed that there are very few privacy trials or full judgments through which to interpret the law because either the issue has been resolved with a preliminary injunction, or once something is published 'most people don't want to have a huge row about it in public afterwards'. The few that have come to court 'are quite interesting as to the different views that are taken. They're all trying to balance very difficult questions'. In YN's view, a draft statute could never cover every eventuality:

One of the things the courts have repeatedly said about privacy ... and once you practise in the area it becomes blindingly obvious, is that every privacy case is fact sensitive [so] it's very difficult to make generalisations. You have to apply a set of principles on the facts that you have there. Each set of facts is different. So that you're really getting a set of broad principles, which is what it seems to me the courts are doing now, and applying the facts as best you can.

Instead, the focus as regards privacy tended to be on the procedure surrounding injunctions and the practicalities of protecting privacy in the internet age, and establishing the public interest. For one in-house lawyer YI, the issue was fairly straightforward:

If you ask my view generally, I don't think there is a fine line between what's in the public interest and what's private. I think something is either private or in the public interest. If it's in the public interest, we're entitled to publish it. I just don't think there's a line there. You read something and it either is, or it isn't.

Dispute resolution systems

Media specialist lawyers frequently complain of the frustrations of the cumbersome civil litigation processes, particularly in defamation, to resolve disputes for both

claimants and defendants. Glyn Lancefield, a solicitor in commercial litigation, describes how

A fully-contested defamation claim can often place the parties on a rollercoaster ride of litigation, sometimes involving several interlocutory court hearings over the course of several years before reaching trial. For the moment funding arrangements are still available in defamation claims, but even where cost and cost-risk is not an issue, the litigation itself can be very stressful and consume large amounts of the parties' time, whether they are bringing or defending a claim. This is increased by the very nature of defamation claims involving the personal reputation of the claimant party. All parties will therefore welcome any steps that are taken to try to bring about an early resolution of defamation claims. (Lancefield, 2014)

Despite wide consensus that early resolution is preferable for parties, lawyers are often ambivalent about the efficacy of such procedures. Interviewees were asked about what Alternative Dispute Resolution (ADR) mechanisms they thought might assist the process. While interested in processes such as an Early Resolution process set up in 2011⁸⁰ and other schemes involving internal ombudsmanship and arbitration, many interviewees remained sceptical of their efficacy in all circumstances and whether their enforcement would improve perceived problems with the existing infrastructure.

It was clear, however, that informal mediation systems already existed in defamation and privacy cases, even if not talked about extensively in the previous literature in this area or in the parliamentary material on defamation reform. External solicitor YP described how it was possible to give defendants a route that avoided court action if appropriate:

...the reason [defendant] clients come to us is because they know that we do take a very quick, clean decision on something, and give advice. And if it is right to get out, we get them out. And the reputation that I encourage my clients to build up, is: 'if we've got it wrong, we will make you a sensible settlement proposal at the outset. If you don't want to take it, fine, we're going to fight you because we'll have protected ourselves and then we will go all the way but having got safeguards in place'.

⁸⁰ See: <<http://www.earlyresolution.co.uk/>>.

It is impossible to determine the extent to which complaints are resolved this way; settlements made out of court are not formally recorded and even those that result in a Statement in Open Court (SIOC) are not systematically collated. Despite the prevalence of this route, critical observations were made. For one interviewee, mediation was just another 'weapon' at a lawyer's disposal, if it meant paying the other side off before it reached court. Another, external solicitor YO, was concerned that multiple mediations 'cost a fortune' with numerous lawyers involved and resulted in a compromise which neither side was happy with: 'a claimant doesn't get the vindication they want, a defendant's having to concede things which it might not want to concede'. Better, in their view, would be a system comparable to the Patents County Court⁸¹ model with a cap on costs and compensation.

Despite lawyers' apparent ambivalence towards them, ADR systems might become more integral to the dispute resolution process, however, with post-Leveson requirements around arbitration (in the cross-party Royal Charter; see below) and an emphasis on the importance of ADR according to pre-action protocol. It is also relevant to mention more general Civil Procedural Rules on case management, as summarised by the Master of the Rolls in his memo marking the enactment of the new defamation legislation:

Civil Procedure Rule 3 provides a judge with a wide range of options to intervene in cases and 'call in' parties at an early stage. For example in determining the order of issues to be dealt with, requiring parties to attend hearings and to 'dismiss or give judgment on a claim after a decision on a preliminary issue'. Rule 3.4 gives the court the power to strike out a claim as an abuse of process or where there are no reasonable grounds for bringing the claim. (Dyson, 2014, p.1)

For the Master of the Rolls, Lord Dyson, this general procedure – in combination with ADR and procedural changes to accompany the enforcement of the Defamation Act 2013 (such as a change to Civil Procedural Rule 26.11 to reflect the removal by the Act

⁸¹ Now the Intellectual Property Enterprise Court, dealing with intellectual property issues such as patents, copyright or trademark disputes.

of the presumption to trial by jury in defamation cases) – will help ensure early resolution of defamation cases.

To settle or fight?

One final point should be made: there is a tension between a desire for full trials to test the law, answer significant legal questions, and find a fair outcome; and the burden this places on defendants and claimants. In other words, while external and internal lawyers occasionally indicated an academic desire to see answers given at full trial, this is not necessarily their pragmatic desire, with regard to the interests of their clients, whether claimant or defendant. But on other occasions they think it *is* critical to fight a point of principle despite the risk and cost to their client. For external solicitor YO, it was important there was 'proper High Court litigation' for a claim involving a 'big important political story'. YO and others indicated that cases were settled even when content might be defensible, owing to the high costs and financial risk of mounting a defence. For them, this was detrimental to free expression, as will be explored below in their articulations of the chilling effect. The overall policy goal however, expressed in the government's consultation on defamation costs protection, is to encourage earlier settlement of cases (Ministry of Justice, 2013b, para.10, p.5); it is also judicial policy. The Master of the Rolls described how,

Early resolution is desirable in defamation and privacy cases, as in other areas of litigation, to sort out disputes quickly and economically. It is particularly important in defamation cases, however, in view of the very high costs that can arise. (Dyson, 2014, p.2)

In this way, the practical aim among in-house practitioners and policymakers for early settlement and reduced costs overrides the usefulness of judicial determination on important issues, which can help lawyers make better decisions at an earlier stage but is a greater strain on resources.

Costs and damages

Interviewees suggested that the tendency to settle could be attributed to high costs and financial risk. For example, in-house lawyer YB claimed that the costs system involving Conditional Fee Agreements (CFAs) had been 'a major disincentive to fighting a case even where you would have a good defence. That's indisputable really'. Furthermore, in YB's view, 'very few defamation claims are ever making it to court. They get settled. Because the costs of fighting them – even if the newspaper is in the position of fighting them – [the] costs of doing that are too astronomical. There is a great incentive to settle, even where you have a good defence.' There seemed to be general consensus on costs at least: 'We're all agreed the costs are too high', said a solicitor who acted for both defendants and claimants (YG). This view is well-supported in the evidence given to the various parliamentary defamation committees and the Jackson review (2010b), with a dominant view – across the board – that the cost of defending or bringing defamation litigation under the CFA system was a major burden for media organisations and claimants. Night lawyer and barrister YH described the predicament succinctly:

Disputes ought to be able to be resolved without half a million pounds being at stake. It doesn't do anyone any good because claimants can't bring claims they want to bring and defendants can't fight claims they want to fight.

Until reforms are implemented,⁸² claimant lawyers acting on a Conditional Fee Agreement (CFA) are able to recover base costs and a success fee from the losing party, which could be up to 100% of the normal fee. After-the-event insurance (ATE) could be taken out in a CFA case to insure against paying the costs of the winning side and their own disbursements in the event of a loss, although the premium could cost almost as much as the sum insured. The ATE premium could be recovered by the winning party from their opponents as part of the cost of the action although these were usually only

⁸² At the time of writing, the government's proposed cost protection regime to replace the existing no-win-no-fee system had not yet been introduced, although it originally intended to make the necessary amendments to the Civil Procedure Rules in April 2014 (see: <<https://consult.justice.gov.uk/digital-communications/costs-protection-in-defamation-and-privacy-claims>>). For a full explanation, see Appendix Six.

ever paid by losing defendants for two reasons. First, the difficulty for CFA-funded defendants to get ATE insurance made it unlikely that a losing claimant would ever have to pay a winning defendant's ATE premium. Second, these ATE premiums could be made conditional upon a win, meaning that the claimant would not pay for the premium in the event of a loss. Crucially this meant that claimants could bring CFA claims supported by a conditional ATE insurance agreement at no personal cost to themselves, win or lose. Their lawyers, however, were under pressure to recover costs from the other side. Insurers relied on other winning cases, where premiums were recovered from the opponent, to even out the loss of a premium and costs in losing cases. Thus premiums became very high⁸³ (see Leveson, 2012d, p.1501, para.2.7; also Civil Justice Council, 2013, p.5).

The interviews took place prior to the publication of the Leveson arbitration recommendations and the subsequent introduction, although not activation, of a new costs 'incentives' regime for what the government calls 'relevant publishers' through the Royal Charter and Crime and Courts Act 2013 (although seen as 'penalties' by the regime's critics: see Phillips, 2013).⁸⁴ Additionally, the government has since published proposals for costs reform that would replace the CFA and ATE premium regime with a variation of the Qualified One Way Costs Shifting scheme (QOCS). The current state of play is set out in Appendix Six. At the time of the interviews, however, the main attention was still on procedure around Conditional Fee Agreements (CFAs), with most in-house lawyers raising concerns about their detrimental effect on freedom of expression.

⁸³ For an overview of the situation leading to the new proposals see the Ministry of Justice's summaries for its cost protection consultation and the Civil Justice Council Working Group report (Ministry of Justice, 2013b; a; also see Civil Justice Council, 2013).

⁸⁴ For a discussion on the problematic nature of a 'coercive' regulatory system with sanctions related to litigation damages and costs, see Gibbons, 2013 (although he discusses Leveson LJ's proposals rather than the final scheme devised by the government).

The arguments have been well-rehearsed elsewhere⁸⁵ but one main complaint was that lawyers acting for claimants on CFAs were incentivised to recover extensive costs and a success fee through a final win, rather than settle at an earlier stage. In the event of a loss they would not receive a fee and After-The-Event (ATE) insurance would cover the other side's costs. One solicitor, mainly acting for media clients, described the conundrum in strong terms:

You've got lawyers participating in settlement discussions looking after their own financial interests, not those of their clients ... That's the reality. That's why it makes cases impossible to settle and that's why they're such a problem. It's not the concept of giving people access to justice, it's the greed I think, which comes from people just using them to run up costs.

YH, a barrister, described the predicament from the claimants' viewpoint: 'part of the problem is by the time I'm seeing these claims they've started spending quite a bit of money and they generally want that money back'. Additionally, because claimants were more easily able to secure a CFA or ATE protection they were perceived to hold an unfair financial advantage over defendants, whatever the merit of the case. On the other side of the debate, clients (both defendants and claimants) and some lawyers were concerned about access for justice in the absence of the CFA and ATE mechanism (see Jefferies et al., 2012; Heffer, 2011). Additionally, ATE was not always an obvious choice for claimants even if it were available. Helen Anthony, lead researcher of English PEN and Index on Censorship's alternative dispute resolution research, described that she had been told by one claimant lawyer that not only was the risk of losing prohibitive to claimants, but the 'cost of ATE insurance was prohibitively expensive'. She set it out as follows:

Given the rules, where you won't get that insurance back if the case is settled within a couple of weeks of issuing it [the lawyer] couldn't advise his clients to take out an insurance ... [it] would cost £20,000 in a case where damages are estimated to be £15,000. They could try and settle, and go – in this case – to mediation, but if they hadn't gone to mediation, if they had tried to issue proceedings or had issued proceedings and settled they might have got 15k in damages, that would have been immediately wiped out by the ATE insurance premium. That in itself is prohibitive...

⁸⁵ See, for example, English PEN and Index on Censorship, 2012.

It was clear in my interviews that cost negotiations were a crucial part of the dispute resolution process. One solicitor described that when acting for defendants the firm would

...make very clear 'without prejudice' offers early on which will be things like 'if you back off now our clients will not pursue their costs. If you go on we will be making an application to strike out and we will be after costs; if you go now, walk away and take their [claimant's] own costs then our client will say this'.

In other words, it is desirable for both sides to 'get out' of the dispute before costs on either side started mounting up. Once lawyers on either side have accumulated costs it becomes all the more important to recover them. YG, a solicitor who did both claimant and defendant work, described that:

One of the difficulties one has with litigation is that once it starts then the costs themselves become an issue; [in a particular case] it might have got to the stage where the claimant would have said well, 'if you would apologise and pay the costs then I will not continue' and the newspaper might have said 'well we'll apologise but we won't pay the costs'. Those sort of situations. The costs can sometimes actually become the driving factor for forcing the thing onto trial. Both sides are confident in their own way [and] think they're going to win.

Damages

In the interviews with in-house lawyers the level of damages were not raised as a major point of concern, except in relation to the recoverability of base costs and a success fee. This may be because so few defamation and privacy cases actually result in trial. Compared to other types of civil litigation, damages are not high in defamation cases and the primary remedy may be an apology or a correction (Civil Justice Council, 2013, p.39). Helen Anthony described how her research indicated that a personal apology is important vindication to a claimant, and could in fact persuade them to drop their claim for damages. Likewise, in-house lawyer YJ commented that a primary concern is content rather than damages:

...It's not like a personal injury claim [in which] the money's important because that's going to give you a better quality of life ... I find it difficult to argue how a sum of money in a reputation [case] when it's still up [the content is online], is going to help you. Maybe in some instances.

In privacy cases, the relatively low level of damages may deter claimants from pursuing legal action. According to in-house solicitor YN, damages in privacy cases 'have not been vast enough to really justify many claimants wanting to have their day in court'.

The level of damages did not feature in many interviewees' formulation of the chilling effect (discussed below), but one interviewee, an external solicitor (YM), suggested that damages as well as costs should be means-tested to make the system fairer to ill-resourced defendants:

I think it's important we have a regime on costs, or a regime on damages which depends on the resources of the defendant ... Damages are calculated on the basis of notional injury to reputation, notional figures for vindication [and are] not allowed to take into account the means of the defendant.

Ongoing debate among lawyers and journalists over costs and damages and whether they give rise to an unwarranted deterrent to freedom of expression, starkly exposes the subjectivities at play when assessing the potential chilling effect of new defamation and privacy policy measures and procedure. The next section explores these subjective positions in more depth.

4.4. Chilling effects

The chill is usually described as an effect on decisions taken at a pre-publication stage, albeit based on post-publication factors, and lawyers' articulations of the concept mainly related to these post-publication complaints and litigation and costs in particular; for YB 'costs are a major chilling effect'. Interviewees described the way it arose differently. Solicitor YO thought the chilling effect was not something 'you can measure' as a direct effect of the law, but that it described, first, the way in which

publishers did not publish defensible material or settle defensible cases because of excessive costs and risk of CFAs:

It's not something you can say easily: this story was spiked because of the law ...What you can say is that particularly when the CFAs were at their height and the worst excesses of CFA costs, excessive costs [were] being used as a lever [in litigation] ... there was a nervousness with some media organisations about what they published. Not because they weren't satisfied that what they were going to publish was true, or defensible but because they didn't have the money to spend on protracted litigation which is always uncertain, however strong you think your case is. That does exist. There is a worry.

Furthermore, in YO's view, publishers were forced to settle, even when they had a strong case:

I've seen cases settled where the media organisation believes and actually has quite a lot to support what they've said but they either don't have the money to fight it, or they can't take the financial risk that they fight it through because it would close their business. Or involve them having to make a number of people redundant. That's where I see the chilling effect...

YO also saw a chilling effect in the way that internet hosts removed material without the author being given an opportunity to defend what they had written: 'you've got online organisations having to silence content which they host, without the authors of those contents being given an opportunity to defend what they've put up, I think that's another chilling effect'.

YO's first half of the definition was echoed by in-house lawyer, YJ: 'For me, the massive chilling effect has been CFAs ... arguably the number of cases that have settled, wrongly or rightly, whether it be for commercial reasons or otherwise, and not gone to trial. Or people have been scared to do something pre-pub: you can have situations where someone writes to you pre-pub and says we're on a CFA. At which point, you know, already the pound signs are falling from the sky. And I think that's had a massive effect and that's more of the effect that I've seen'.

For YJ the problem in defining the chilling effect was that there are 'so many layers to it and so many different angles and so many different areas', to 'really grasp the chilling effect' it was necessary to split it into different areas: privacy-related interim

injunctions and defamation costs. With regard to the former, YJ was less convinced of the negative effect, and did not consider it a major issue at the publication: 'I do think there are circumstances where information should remain confidential, or there is sensitive information which people don't have a right to know. And I think it's wrong that people find a way to circumvent it, to put it on the internet. But in terms of an effect on journalism ... from a privacy perspective, it's hard for me to have any handle on it, because there's so little here [at YJ's news organisation], in terms of [privacy issues]'.

The chilling effect did not automatically arise when publication was halted, according to another in-house lawyer (YI), who described how their publication had not published a particular item following a complaint that it would be in breach of an individual's privacy. While YI thought that publication of this particular item would be 'technically' justifiable following the decision in *Campbell v MGN* [2002, 2004], the journalist may *not* have felt chilled because 'it wasn't a critical part of the story'. Instead it was an ethical decision for the newspaper's editors. YI did however perceive a chilling effect caused by the ongoing Leveson Inquiry, examining media standards and ethics. As an example, YI described how the media had held back in the way it reported an individual's death:

No newspaper has looked into the circumstances ... a year ago every newspaper would have done. The fact that none of the tabloids looked into that is very much a chilling effect of Leveson. Some people may argue that's a good thing; I don't know.

Interestingly, whether YI personally perceived this story as a legitimate line of inquiry appeared to be incidental; there was still a chilling effect: 'Is there a public interest in the public knowing about that? I don't know. Some people would argue yes; some people would argue no'.

YG, an external solicitor, used the chilling effect to describe the deterrence of publication but indicated that they did not necessarily perceive deterrence as undesirable. It is generally portrayed as negative but 'now and again you will find witty

judges and other commentators spotting the contradiction in that', YG noted, explaining their view as follows:

Why should it be a negative effect that people aren't careful about what they publish? It is defamatory. The basic principle long before we had Reynolds is – and before we had laws of privacy – is that you can publish whatever you like about anybody but [if] it is defamatory ... if they sue, then you have to show it's more probably true than false. Why do you publish something bad about somebody, why do you have the right to do that ... It's not such a big burden. That's the real issue. It has become developed, and it was imported here from America, this expression the 'chilling effect' as if it was something that was outrageously an infringement on freedom of expression. It's just a label for people who are trying to allow more freedom for the press. It's just a label they use to criticise laws without actually having a debate, a real debate on what those laws actually say and how they should be developed. How do you get the balance right?

For YG, people use the chilling effect to describe the deterrence or suppression of material; this generalised use misses the nuance that some material *should* in fact be lawfully deterred. This is similar to the argument made by Leveson LJ in relation to the Data Protection Act (see Chapter Two). In an interview, Eric Barendt also raised a similar point: 'The other aspect of this is that it is always assumed the chilling effect is bad. From the press's point of view, and other media, it is bad. There is a view which has only been expressed authoritatively by Lord Hoffman,⁸⁶ some chills are rather good because they inhibit the press from publishing stories which are completely baseless and which may be seriously damaging to someone's reputation and if it stops sloppy journalism, jolly good'.

External solicitor YP also defined the chill as straightforward deterrence, but saw this as a straightforwardly negative thing, which 'takes the form of people making decisions that it's just not worth publishing that story; they'd rather publish something else'. It was not just a question of strictly 'public interest' material being deterred by the law; it could apply more broadly. However, YP also identified that stories might not be published because of the publication's profile rather than legal reasons. Eric Barendt

⁸⁶ See, for example, Lord Hoffman's comments in *Gleaner Co v Abrahams* [2003], para.53, para.72.

also mentioned the extra-legal factors that deter investigative journalism, suggesting that the chilling effect may be used as an excuse for not fully investigating a story:

A question which might be worth thinking about is: do sometimes the media use chilling effect rather sloppily to mean 'well, we can't bothered to do this, or check this story out?' It may be used sometimes as an excuse rather than a very good reason for not engaging in serious investigative journalism. It's a trite observation now, isn't it, that most of – or much of – the tabloid press has – even the Sunday Times which was very big on investigative journalism – has to some extent abandoned or cut back on serious investigative journalism. Because ... it's too expensive, and too much hard work. Detailed inspection of documents, detailed questioning of witnesses who are hard to get at, when they would much rather rely on paparazzi and publish celebrity [content] and the chilling effect may be used very sloppily as an excuse for not pursuing lines of inquiry, which have just been given up because they are seen as too burdensome.

The descriptions posited by YO and YJ allowed for the missing nuance identified by YG and assumed lawfulness by definition: it was the deterrence or forced settlement of *defensible* cases that caused a chill. Similarly, while in-house lawyer YN recognised that Article 10 rights were not uninhibited and required a balance, there was a chill when material that was *entitled* to be published was not published because 'the balance has gone just slightly too far in that instance':

That's where the chilling effect comes on one's free speech. So what you're really saying is that chilling effect can come about both through the law and... what I call procedural or practice. That's something that is more subtle ... for example, if it becomes clear, that you are going to have a long legal battle with someone who has no money but is on a Conditional Fee and it's not a major story. Is it something an editor wants to take a risk on? ... But you're not then balancing out simply an Article 8 or an Article 10 right and trying to make a decision. You're balancing out the practical consequences of a publication, given that you are a company with ultimately limited resources, what is the best way to spend your money and your resources?

CFAs do have a chilling effect, according to YN: 'particularly the more that you're living near the line on your resources, the more of a chilling effect it can have. Because unfortunately Article 10, Article 8 rights are ultimately going to be determined through the courts – and determining things through the courts costs money'. This is particularly acute for smaller publications and local newspapers. Again, the view was expressed that it was detrimental that important test cases did not reach court and in fact the CFA system, in which conditional fees were calculated on risk, made it

expensive for newspapers to defend strong cases all the way. The definitions offered by some of the in-house lawyers indicated that part of a chilling effect was that defensible cases could not be defended with any certainty and without significant financial loss, even in the case of a win. It was not the action being brought per se that was the problem but that the system encouraged them to settle when they wanted to fight them, or not publish the defensible material in the first place. YN was not sure this could ever be removed; 'there will always be ... a chilling factor, with regard to any court, legal issues' although reform should be instigated when it became unacceptable:

That's not peculiar to newspapers, or broadcasters or indeed any company. That would be the same anywhere. The issue is whether or not you can identify certain processes or practices or maybe legal issues whereby the chilling effect becomes, if you like, actually unacceptable. Where there needs to be reform to reduce that chilling effect so that information can be put into the public domain and that's how it seems to me you have to balance it up.

Barrister and night lawyer YH was not aware of a significant chilling effect during the night lawyering process. While YH recognised that there are certain individuals who 'because they use the law a lot, less is written about them', there wasn't 'too much of a problem' from their vantage point as a night lawyer. YH did, however, differentiate between different publications. A title with a more temperate tone was likely to require fewer changes than a publication with a more fiery and opinionated style.

Inconsistencies

While in-house lawyers and lawyers undertaking defendant work were clear that the current legal framework could cause (a) the deterrence of defensible publications and (b) the settlement rather than defence of an action against defensible material, there was an apparent contradiction in answers to questions about everyday practice, in which they felt confident that they could find ways to publish public interest content supported by evidence. Eric Barendt said this had also been the case during his research in the mid 1990s that led to the book 'Libel and the Media':

We were, it was a long time ago, trying to establish to what extent there is a chilling effect by talking to newspaper and broadcasting – to some extent magazine – editors, lawyers and journalists and what one found – as far as I remember – is that if you ask newspaper lawyers or journalists ‘do you ever sort of pull a story because of libel risks?’ they would tend to say ‘oh no, no, no we always get it in, or if we re-word it so that it gets in’, but if you ask them a more general question about ‘do you think libel law has a chilling effect’ they would say yes. Yes it does. And it’s a little hard to make sense of this apparent inconsistency of answer.

A possible explanation offered by Barendt suggests a more subtly manifested chill:

... [T]he chilling effect is not just about suppressing or ‘oh, that may sometimes happen’; it’s more about a general fear of ‘this line of inquiry is off limits’, or ‘we must be very careful what we say about Bloggs, because Bloggs always sues’. This raises a general point about what we mean, what lawyers mean, about what journalists mean, when they talk about the chilling effect ... they may be either talking about the impact of a particular story about a particular person – which as I said, they tend to... say ‘oh, we can always get it out in some way’ – or it’s a more general fear of not just the particular person you’re talking to, but the media in general not covering a story, not publishing, not investigating.

This reflects the book’s separation between ‘direct’ and ‘indirect’ chills, which still serves as a useful dichotomy in the current context. Examples had been given, Barendt said, about particular individuals and companies that couldn’t be mentioned but this was a general avoidance, rather than the suppression of evidence:

It’s more a sort of general thing – ‘we don’t go into that’ – there’s a yellow warning light about that. To that extent, defamation law clearly exercises some chilling effect; a prospect of a libel action is in general to be avoided. If you [have] got some evidence, some sources, can you get the story out? Then they always say ‘yes, actually we can’.

There was a similar inconsistency in the lawyers’ observations about privacy law. They described it as a dominant area of concern, but this did not appear to be reflected in the levels of complaints and threats of action. Even at a publication where privacy accounted for a significant proportion of its pre-publication workload ‘in many guises’, the lawyer suggested that most post-publication complaints ‘curiously enough’ were not privacy complaints. There may be a general yellow warning light around privacy stories, but there were not necessarily high levels of complaints or interactions in this area; defamation continued to be the crucial area of potential litigation. This was also reflected in the online journalists and writers’ responses (see Chapter Five).

4.5. Conclusions

Drawing on lawyers' and legal specialists accounts of everyday practice, this chapter has set out key features of media-legal interactions, in an effort to explore the role of lawyers in the editorial gatekeeping process and develop a more sophisticated definition of the chilling effect.

From the interviews and observations it is clear that lawyers play an important and influential role in the social process of editorial gatekeeping even if they maintain that they play a strictly 'advisory' role within their professional guidelines. These practices are influenced by journalists' cultural norms and behaviour; likewise, journalists' behaviour is influenced by the legal advice and training they receive. Lawyers may take on a variety of roles at all stages of the pre and post publication process (for example, drafting corrections or suggesting amendments to copy). While there are certain similarities between procedures at different newsrooms, it is clear that there is variety in the way that publications deal with complaints and their interaction with journalists. Interestingly, there did not seem to be clear policies about feeding legal information back to journalists on specific stories,⁸⁷ but that in-house lawyers considered it important that journalists understood why changes had been made to their work.

While lawyers frame their formal understanding of freedom of expression, the public interest and the chilling effect in terms of the post-publication process (the cost and risk of litigation), the chilling effect is perceived to be manifested at a pre and post publication stage. Perceptions varied, but several of the in-house lawyers had sophisticated definitions that described the deterrence of (a) publication of *defensible* information and (b) settlement of complaints over *defensible* information. Other interviewees criticised the tendency to assume that a 'chill' was negative, but this was predicated on a less specific definition of the chilling effect as suppression of defensible

⁸⁷ This may change with the introduction of the new statutory public interest defence in the Defamation Act 2013, which may require specific evidence behind 'public interest' decisions during the editorial process.

or non-defensible material. The next chapter considers similar issues from the perspective of journalists and online writers.

5. Legal perceptions of online and hyperlocal journalists

The chilling effect comes right at the start of the editorial process with reporters and news desks, rightly or wrongly, filtering stories where they see potential legal problems.

(Anonymous survey respondent, 2013)

If lawyers had varying perceptions of the chilling effect and the relationship between defamation, privacy and journalism, there was an even wider spectrum of interpretation for the journalists and bloggers participating in the research: at one end of the scale, a blogger whose ignorance of libel law means it has 'no influence' on their work, to another for whom the state of libel law 'impacts every article, moderation decision and tweet'. This next chapter examines the experiences and views of journalists that relate to the torts of defamation and misuse of private information.

5.1. Decentralised news work

Following Wahl-Jorgensen's call for attention to 'decentralised' news work (2009), this chapter attempts to capture quantitative and qualitative data relating to journalists operating outside traditional newsroom structures or with hybrid models of employment, with a focus on decentralised media legal decision making. This contrasts and complements the data in the previous chapter, which mainly focused on centralised news work: the experiences of lawyers within mainstream media organisations and the legal advisory structures in place.

It follows a similar objective to the previous chapter, to analyse social interactions with the media law and subjective perceptions of the chilling effect but from journalists' rather than lawyers' perspectives. As discussed in more detail in the methodology section, a different approach was taken. In place of interviews, responses were gathered

through online surveying, and analysed in combination with a few interviews, scrutiny of online accounts and reports, and policy and legal documentation.

With no official professional accreditation for journalists, it is very difficult to isolate particular sample groups or establish population sizes, as might be done with lawyers or other professionals. The population cannot necessarily be measured by the number of employees at particular media organisations, which may include non-journalistic roles and a greater pool of freelance contributors. The Office for National Statistics has reported a figure of 70,000 in 2013, rising from 57,000 in 2007, quite possibly an over-estimate (see Nel 2010). While the exact nature of the professional activity of this population is unverifiable, it indicates that a significant proportion work part-time and on a freelance basis; only 37,000 are full-time and employed (Ponsford 2014; ONS 2012, 2013). Clearly, a significant proportion work in a 'decentralised' way.

The surveys were designed to capture data relating to journalists regularly writing online. It was, however, necessary to also look at targeted and specific groups who share particular working conditions to draw more meaning from interpretations and experiences. A case study chosen for this research was 'hyperlocal' media; as discussed in the introduction to this thesis, this is a description that has become increasingly used to describe community media sites, usually independent, covering small geographical areas.⁸⁸

Hyperlocal activity

The most reliable indicator of the hyperlocal population is an online directory hosted by OpenlyLocal and currently curated by TalkAboutLocal.⁸⁹ Including non-independent sites, it contains over 700 URLs to local sites and platforms. However, not all these sites are active. In June 2013, Harte established that of 632 hyperlocal websites listed on the

⁸⁸ This section draws on research conducted as part of my role in an Arts and Humanities Research Council (AHRC) funded research project at the University of Westminster; relevant publications are cited in-text.

⁸⁹ See: <http://openlylocal.com/hyperlocal_sites>.

Openly Local database, 496 were 'active' and operating in the UK while 133 were no longer active (Harte, 2013, p.2).

Scholarly research on this hyperlocal sector is in its infancy (see, for example, Williams et al., 2013), and there has been very limited attention paid to producers' legal practice and concerns, with minimal legal support for actors in the hyperlocal sector, or in 'citizen' journalism more generally, particularly in the UK (Radcliffe, 2012, p.23). What follows is an attempt to analyse the working practices and legal experiences of hyperlocal publishers and a wider and self-selecting group of journalists, the general sample, working for a range of national, regional and specialist publications (mainly online).

5.2. Survey overview

Qualification

This thesis has deliberately avoided the use of problematic umbrella terms such as 'citizen journalism' and user-generated content (UGC) and questions about whether these categories qualify as journalism in a legal context, which continue to be debated extensively elsewhere.⁹⁰ While recognising the legal and social significance of the debate, it was considered outside the remit of this thesis which is interested in subjective perceptions around sustained journalistic activity, defamation and privacy law. For this reason, the surveys targeted particular types of content producers, but gave them the opportunity to self-define themselves as journalists or otherwise, without getting ensnared in questions about who should qualify. Participants were eligible to participate if they described themselves as (a) journalists or (b) online writers. Obviously, the hyperlocal sample targeted those writing about local and regional issues; for the general survey, journalists were split between covering national,

⁹⁰ Especially in the context of US shield law protection and press credentialing; see, for example, Mark Pearson, 2013; Hermes et al., 2014. See Rowbottom (2012, 2014) for a rigorous and detailed discussion on the regulation and protection of different types of digital media speech.

regional and special interest issues. The predominant medium for publication among journalists was online.

Jurisdiction

As discussed in more detail in the methods overview in Chapter One, the second qualifying question determined whether they expected to reach a significant audience in England and Wales. The purpose of this was to capture respondents who were most likely to be interacting with English law, including those writing for local, national and specialist interest publications. The general sample was asked 'Do you expect your readership to be predominantly based in England and/or Wales?'. Following feedback from a potential respondent that this might neglect those who worked for UK based publications that reached significant international audiences, the wording was changed for the second version, targeted at hyperlocals to: 'Do you expect a significant part of your readership to be based in England and/or Wales?'.

Targeting

The online questionnaires were disseminated in two main batches: first, among online journalists and writers in general through industry websites and social media; second, among hyperlocal and community site journalists and writers, who were directly targeted by email. These two samples will be described as 'general' and 'hyperlocal', respectively.⁹¹ The only significant difference between the two surveys was the alteration of the question wording described above and the insertion of a supplementary question in the 'hyperlocal' survey, also based on respondent feedback. This extra question asked respondents about the outcome of threatened legal action which was never issued as a formal claim in court, enabling me to track out-of-court settlements which had never involved a claim form.

The general self-selecting survey was advertised via media industry websites and social media. My own social media network includes many journalists and bloggers as a result

⁹¹ See Chapter One for a discussion on the survey methods used.

of working in online journalism and my personal blogging activity about the industry and media law, allowing collection of a variety of responses from online publishers and journalists, without imposing artificial conditions, such as membership of particular organisations or institutions. The hyperlocal survey was directly targeted to 225 publishers via email or the contact forms on their sites in an attempt to isolate data about a specific genre of online publishing. For analytical purposes, the hyperlocal sample provides a more reliable representation of a particular sector, but the general sample allowed a wider breadth of responses not limited by my selection of suitable candidates.

While these surveys asked about other influences, the law was the central focus, which respondents reflected in their answers. Some context is needed, however. In a wider and separate survey of hyperlocal sites,⁹² only 9% of those who wished to expand their sites indicated that a lack of legal resources was preventing them from doing so (n=127). However, a number of respondents indicated that more legal support would be helpful, and in a few cases, its absence was inhibiting their pursuit and publication of campaigns and investigations. Asked in an open-ended question what sort of support they would take advantage of if it were available, several suggested legal resources. Suggestions included: 'Journo legals; business structure options to limit liability'; 'ongoing legal advice around litigation and copyright'; 'legal training'; and 'legal information'.

The total sample size, once irrelevant respondents had been disqualified, was 107 for the general, self-selecting survey (population size unknown) and 86 for the targeted hyperlocal survey, a response rate of 38% and reaching 17% of the active hyperlocal population size cited by Harte (2013, p.2). However, the number of respondents answering each question varied because of the answer dependent paths they took and the fact that they were able to skip some questions. While conclusions can be drawn

⁹² Completed as part of an AHRC-funded project on media plurality; see Williams et al. (2014); Barnett and Townend (2014).

from the quantitative and qualitative data it is important to recognise that the sample size is small, and only represents a portion of active journalists and online writers in England and Wales. Nonetheless, the findings should provide a useful foundation for more extensive surveying in the future and the present views and experiences more systematically than has been done in the past. Given the relative scarcity of empirical evidence of the relationship between libel, privacy and journalistic practice, respondents' reflections are quoted at length, although it was necessary to make some selections, and quote partially in some instances.

In the general sample, 76% described themselves as journalists; in the hyperlocal sample, only 40% fell into this category. The vast majority of journalists in both samples mainly worked for publications that used online platforms (just under 90% in the general sample; over 97% in the hyperlocal sample). The majority of the general sample mainly published material on other people's sites; the majority of the hyperlocal sample mainly published material on their own sites. Most respondents to both surveys lived in England and Wales (100% of the hyperlocal sample). The opening section collected data about the type of content published by the main publication they wrote for, and the platforms on which it was published. They were asked about years of experience and whether they were paid for their journalism and online writing.⁹³

Several different paths were created in the survey, allowing for categorisation of different respondents, designed to avoid generalisation about 'blogging' and online activity. These can be summarised as follows.

- A. Journalists mainly publishing on third party sites (including an employer's)
- B. Journalists mainly running their own organisation
- C. Online writers mainly publishing on third party sites

⁹³ Summary data on respondents' profiles, including sample sizes, is given in Appendix Four.

- D. Online writers mainly running their own website or blog
- E. Journalists and online writers in categories A and C *also* running their own blogs and websites.

This categorisation allows for differentiation between people who control their own legal resourcing, and those who rely on institutional support and guidance. Owing to the small number in each group (A and D were the biggest groups) differences between the groups were treated cautiously; instead, broad comparisons are made between the hyperlocal responses, and the wider general sample of responses.⁹⁴ Information about the professional or recreational nature of their publishing activity was also collected. Among the journalists in both general and hyperlocal samples, the majority were paid for their work whereas most online writers were not paid for their work. Online writers described their activity in different ways. In both samples 'recreational' was a popular label. While a majority of hyperlocal respondents described their activity as 'citizen journalism', only a minority of online writers in the general sample used this term. For a majority of journalists in Category A, the organisation had more than ten employees. None of the journalists running their own organisations had more than ten employees.

Having established the nature of their publishing activity, the next part of the survey asked respondents what sort of resources were available to them, how often law affected their content, and what other factors influenced their editorial decisions.⁹⁵

Legal resources

Pre-publication advice

As set out in detail in Chapter Four, most large broadcasting and newspaper organisations employ lawyers, either as staff or on a freelance basis, to assist journalists

⁹⁴ There is a possibility that some respondents answered both surveys.

⁹⁵ Answers have been corrected for simple spelling and grammatical mistakes, or marked [sic] where the error is deemed relevant. Percentages are rounded to the nearest whole number which explains why some totals exceed 100. In other instances where a total exceeds 100, respondents were able to select more than one answer.

with queries, and to check copy before it is published. Respondents were asked whether they had access to pre-publication advice. In the general survey just under half of the respondents contributing to other publications said they did (45%). By contrast, under 10% had access to legal advice for their own publication or website.⁹⁶ A similar divergence was seen in the hyperlocal survey as well.

Table 1: Access to pre-publication advice (employer)

Do you have access to pre-publication advice from a lawyer through the main publication you contribute to?

	Yes	No	Not sure
General (n=72)	44%	49%	7%
Hyperlocal (n=29)	31%	59%	10%

Table 2: Access to pre-publication advice (own publication)

Do you have access to pre-publication advice from a lawyer for your own publication?

	Yes	No	Not sure
General (n=72)	8%	92%	0%
Hyperlocal (n=74)	5%	95%	0%

Legal insurance

Although the questionnaire did not offer additional information about the types of insurance available to online publishers, some brief context will be given now. There is limited publicly available information about services offered by insurers, or figures about how many people take out media legal insurance. Libel cover is offered as part of some Professional Indemnity and Public Liability Insurance packages⁹⁷ but it would be unlikely to cover the full costs of a libel case: separate After-The-Event insurance would be required. Obviously the cost of cover would be dependent on the nature of the publication, but some publishers have reported it as a prohibitive cost.

⁹⁶ This includes respondents publishing their own sites alongside their main activity for a third party publisher.

⁹⁷ See, for example, information offered by the insurers Hiscox, <http://www.hiscox.co.uk/business-blog/features/what-is-defamation/>.

Investigative journalist Heather Brooke has described how one of the biggest obstacles faced by the Bureau of Investigative Journalism 'was finding reasonable libel insurance' (2012). The online initiative HelpMeInvestigate faced a similar problem, when it needed to secure libel insurance to satisfy its funders but found that the costs were prohibitive.⁹⁸ According to Brooke this 'legal nightmare halts small or online cooperative journalism sites in their tracks'. But, as one respondent noted in the survey, even mainstream publications may not have libel insurance. He or she had found out during a legal training session 'that hardly any newspapers now carry legal insurance – cheaper to settle on a case-by-case basis than the actual premiums'. This was certainly the case at the Guardian in 2011, when its editor Alan Rusbridger confirmed in an online comment that 'we aren't insured for libel' (2011).

Around a third of respondents said they had insurance cover through the publications they contributed to (although many were not sure). Only 3% in both the general and hyperlocal sample took it out for their own publication.

Table 3: Media law insurance (employer)

Does the main publication you contribute to have media law insurance?

	Yes	No	Don't know
General (n=73)	34%	19%	47%
Hyperlocal (n=29)	28%	48%	24%

Table 4: Media law insurance (own publication)

Is your own publication covered by media law insurance?

	Yes	No	Don't know
General (n=73)	3%	97%	0%
Hyperlocal (n=75)	3%	97%	0%

⁹⁸ Discussed in an email exchange with the founder, Paul Bradshaw.

For those working for other organisations there was uncertainty about whether they were covered by insurance or not, or whether it covered libel and privacy disputes. Asked why they had not taken out insurance for their own sites and organisations, the most frequent reason was cost, followed by lack of awareness of its existence, or a combination of both. Even those with legal training were not necessarily aware of its availability. For some, it had simply not crossed their mind; others gave several reasons. One said: 'It hasn't occurred to me; I assumed I wouldn't be writing anything defamatory; no money!!!'. Some said it was not necessary for the type of low-risk content they covered, or they considered their audience too small to warrant concern.

Others mentioned their own knowledge and training; one considered they had sufficient knowledge to self-legal although this had led to a more cautious approach, they said: 'As a very experienced investigative journalist, I have sufficient knowledge of the libel laws to legal myself. Also I always tend to err on the side of caution on my blog'. For another respondent, legal advice was a substitute; cost of insurance was a deterrence but they were also reassured by the fact they had 'some legal training and access to a legal adviser who should hopefully keep me out of trouble'. Others mentioned drawing upon the experience of others informally. One said: '[I] don't write too much that would be considered worthy of requiring it. When I do, I ... check with other contributors and, if necessary, people in or around the profession'.

A few respondents thought that having insurance would 'encourage' claims. One said: 'If people know you are insured they will sue'. At this stage of the survey, it was not clear whether respondents thought lack of insurance was negatively affecting their freedom of expression, but several talked about deliberately avoiding certain topics – including run of the mill type content. One said: 'I avoid publishing anything that might upset people or be libellous. My blog would be better if I did, but for a hobby I don't need the hassle'; another talked about avoiding 'controversy' and 'comment'.

Finally, several were unconvinced of the worth of insurance. One said it would be a 'waste of money' with limited value: 'Good journalism, backed up by good legal advice,

would seek to run news stories that no libel insurer would ever allow to be published'. Another said they had looked for a policy but had not found anything suitable. In summary, while cost was a deterrence for purchasing insurance in both samples, many respondents did not seem to have investigated the possibility or were not convinced they needed it.

Altering and abandoning stories

Impact of libel and privacy

The next part of the survey asked respondents how often they changed or abandoned stories that they considered of public interest because of libel and privacy law. The wording was chosen very carefully, to accommodate respondents' subjective definitions. While a definition of the chilling effect is not necessarily confined to suppression of 'public interest' stories, this was a way of identifying whether respondents were frequently altering or dropping stories they deemed of public importance. For libel, over 60% of the general sample said they changed such stories 'some of the time', but almost 40% said 'none of the time'. For the hyperlocal sites, over half said they never changed such stories.

Nearly two thirds of the general sample said they abandoned public interest stories 'some of the time'; but a similar proportion of the hyperlocal sample said they *never* dropped such stories because of libel law.

Table 5: Impact of libel (changing stories)

How frequently are stories that you consider of public interest substantially changed by you or a colleague in the publication/s you contribute to because of libel law?

	All of the time	Most of the time	Some of the time	None of the time
General (n=81)	0%	3%	62%	36%
Hyperlocal (n=75)	3%	3%	41%	53%

Table 6: Impact of libel (abandoning stories)

How frequently are stories that you consider of public interest abandoned by you or a colleague in the publication/s you contribute to because of libel law?

	All of the time	Most of the time	Some of the time	None of the time
General (n=88)	0%	1%	57%	42%
Hyperlocal (n=74)	3%	0%	37%	61%

The same questions were asked of privacy law. The impact of privacy law seemed far less marked, with only one third of the general sample saying they changed public interest stories because of privacy law and 70% of the hyperlocal sample saying they *never* did. Similar figures were given for abandoning stories.

Table 7: Impact of privacy (changing stories)

How frequently are stories that you consider of public interest substantially changed by you or a colleague in the publication/s you contribute to because of privacy law?

	All of the time	Most of the time	Some of the time	None of the time
General (n=77)	0%	0%	35%	65%
Hyperlocal (n=73)	1%	0%	29%	70%

Table 8: Impact of privacy (abandoning stories)

How frequently are stories that you consider of public interest abandoned by you or a colleague in the publication/s you contribute to because of privacy law?

	All of the time	Most of the time	Some of the time	None of the time
General (n=83)	1%	0%	36%	63%
Hyperlocal (n=74)	3%	0%	26%	72%

As discussed in Chapter Two, publishers' decision to abandon stories before they are published, or even written, is seen as one of the most potent chilling effects of defamation; the survey results indicated that the general sample of online journalists and writers felt it more keenly than a specific sample of hyperlocal publishers. Broadly speaking, hyperlocals were more likely say 'none of the time' and the general sample 'some of the time'. The most marked contrast was between the two biggest groups: journalists from the general sample mainly publishing on other people's sites (n=61) and hyperlocal 'online writers' with their own publication (n=29). Seven in ten said they

abandoned stories 'none of the time' in the latter group, whereas six in ten said they abandoned stories 'some of the time' in the first group. This indicates that there was a greater tendency to abandon stories for reasons of libel among journalists working for an employer or third party sites, than for hyperlocal publishers working for themselves. This does not correlate with these groups' access to resources. In fact, the greater the level of legal resources, the more likely they appear to be affected by libel law.

Further explanation was provided in the open-ended comment boxes. Past experience affected the decisions of some ('After a legal altercation some years ago, I have had to occasionally delete or substantially revise existing and proposed content') and lack of information was cited as an important factor; one television producer said that current affairs documentaries were abandoned for many legal reasons, with a 'lack of verifiable content proving a case being the most common'. Another commented that it was 'rare that a story will be developed and then spiked because of libel threats. The more common issue is that we discover information as part of ongoing investigations that we cannot include as part of a published article because it is not documented enough to stand up in court'.

Lack of training and support also played a part; one respondent without journalistic experience said they were 'treading very carefully at the minute'. A small publisher said they 'learnt the hard way that you cannot really write effectively as a citizen journalist without access to legal assistance – public and private organisations do not take criticism well'.

But for some a *complete* lack of knowledge made them braver: 'No idea what it [libel] is, if it affects the information I publish then I'd be happy to break it. No voice should be silenced for the good of the community'. Many of the hyperlocal responses again indicated that the content they covered was unlikely to be affected, with some deliberately altering the type of content they published. Some took extreme approaches,

saying they 'steer[ed] clear of bad news'; another said they did not engage in issues that were too negative or 'attacking'. One said they avoided 'anything that is likely to cause offence': 'It's just a community blog. I know how easy it is to offend people – often in the most surprising and unexpected way – so try and avoid it at all costs, just to save myself work really'.

Some described how they pulled stories once they had been published, following libel threats, as illustrated by the selected comments below:

I am always mindful of libel laws – but I very rarely have not written about something because of them. Although I have had to pull articles from a website I have run because of what I regarded as a totally unfounded threat of libel in last 12 months. I think the person complaining of being libelled genuinely thought she had a case – genuinely thought she had a grievance. The lawyers she instructed ... wrote such an OTT and bullying letter to me and a number of other websites, it was widely regarded as being utterly daft – nonetheless we regrettably pulled the articles. I don't think there would be a hope in hell of getting sensible and affordable legal advice. (*Journalist – paid, freelance for special interest/online publication/s, 18 years' experience*)

We have pulled a story and then put it back. We have been threatened a few other times (bad restaurant reviews!) but they didn't pursue. (Journalist - unpaid, runs own regional online publication, 14 years' experience)

We have ONCE withdrawn an article after it was published following the threat of libel action, despite a very similar article containing the same basic facts appearing in a national magazine with far more resources at their disposal. However we have a particularly loyal readership and I suspect most of our readers had already read the piece by the time it was withdrawn. We did publish an apology and a statement from the person who had threatened libel which had pretty much the same effect as our article in disseminating the information. (*Journalist - paid, runs own regional online publication, three years' experience*)

One or two stories have been pulled because they are becoming inflammatory, and complaints have been made. (Online writer – unpaid, citizen journalism for regional publication, six years' experience)

We have had very few instances where stories we have published have raised the ire of local luminaries prompting in the first instance the immediate removal of a published story. As yet, we have not abandoned a story because of concerns about libel as far as I am aware. (*Journalist - paid, runs own regional online publication, 25 years' experience*)

Material is regularly removed from [site name] due to libel concerns; we do our best to keep the gist of the material online, redacting only minimally but sometimes an entire thread has to be removed. (Online writer - unpaid, non-profit campaign work/citizen journalism on own website, 10 years' experience)

Sometimes the legal risk was not obvious. 'I have withdrawn two stories ever: one because he asked nicely and the other because I was not expecting negative feedback and was taken off guard. In retrospect I should not have removed even those', noted one. Some respondents mentioned not even starting a story because of libel concerns and 'instinctive' knowledge. One said they doubted they would 'embark on a story if it looked at all as though it might attract defamation claims'. Another said their avoidance was not restricted to libel concerns, but simply because 'a particular person or company is known to be litigious'. For that reason they avoided stories about them altogether, although chose not to cover their press releases either. One described how they might consider writing a post and then 'rule it out'. Another respondent described how:

It does happen [abandoning stories] on occasions, but I think most reporters have an instinctive enough grasp of libel that they don't actually begin working on a defamatory story unless they have a clear idea of what defence they might be able to use. So many more just don't get off the ground in the first place. I do often speak to callers, who ring with information that might be developed into a national news story, and tell them that without significant evidence their claims couldn't be safely published because of the libel risk. (Journalist - paid, freelance for print, television and online national publication/s, four years' experience)

Comment moderation was raised as an issue, although one forum publisher suggested that fear of libel action had not yet caused them to remove any posts. One hyperlocal respondent described how they decided not to host open discussion about their group's operation online:

In the early days of the community group, two geeks were very keen that all discussions about the organisation, decisions, etc. could be made transparent by being all online. We had to persuade them that this really wasn't workable; you can't have all decisions made online for all sorts of personal / political / commercial reasons. So this idea was abandoned. (Online writer - unpaid, non-profit campaign work/social enterprise engagement for an organisation's blog/website, 4 years' experience)

Asked about why stories were substantially changed, similar themes emerged. Journalists' knowledge and collegiate support was key in avoiding legally problematic areas. One observed that 'reporters are legally trained so act as a filter at the start of the process. That means fewer stories that need legalling reach the newsdesk'. Another commented that it was very important to have a second person involved in the process before publication, which could result in changing a story before publication to avoid risk of legal action:

Now and then [stories are changed], which is why it is so valuable to have every piece of copy looked over by at least one other pair of eyes. A few months ago, without thinking, I wrote in a court story that a jury had 'swallowed' the defence of an acquitted defendant. The innuendo, though I didn't intend it, was plainly that I thought the jury was naive and that the defendant was really guilty. My news desk swiftly pointed this out, and more neutral language was used instead to avoid the libel risk. (*Journalist - paid, freelance for print, television and online national publication/s, four years' experience*)

But again, lack of knowledge might also make them less risk-averse: 'My ignorance of libel law means it has no influence on me. My approach is to take a charitable view of those whose actions might be considered to damage their reputations'. Formal legal advice also led to the alteration of stories: 'Following legal advice it is occasionally the case that quotes from – for example – injured parties, might be removed because they are libellous, even though the article is carefully written to avoid being so. Headlines, images and captions are also an important factor when considering the content being produced'. Particular details of a story might be omitted, or problematic phrasing removed. For one respondent, '[t]he angle of a story is not often changed but there are times we cannot reveal certain aspects and details that would make the story more significant in the eyes of the readership'. Another said it had only happened a couple of times, where they had edited reports to 'remove turns of phrase by the writer that could be misconstrued'.

Some raised the concern that angles were being detrimentally toned down: 'There is concern about "rocking the boat" or being seen to align with a certain viewpoint which means statements and written content is becoming increasingly safe and therefore not

saying anything at all'. Some mentioned taking certain steps, which they believed would give them greater protection; such examples are listed below:

I occasionally publish with a disclaimer 'Please note, what follows is not necessarily endorsed by X and Y'. At times I'm persuaded a piece isn't in the public interest – though what I'd planned to say wasn't libellous in any case. (*Online writer - unpaid, citizen journalism*)

I sometimes am careful to report that 'apparently' X according to Y and to use circumspect language. Once or twice I have included disclaimers that are there as much for dramatic effect as anything else. Changes I would say have yet to be substantive. (Journalist - unpaid, runs own regional online publication, seven years' experience)

Adjust wording and phrasing for basic things 'allegedly', not saying someone has lied, not reporting too many details of criminal stories etc. (*Journalist - unpaid, runs own hyperlocal online publication, twelve years' experience - former full-time freelance/staffer*)

I just do not get involved, I would NOT twist the truth and change something that is cheating people. (Online writer - paid, citizen journalism for own online publication, five years' experience)

For one respondent libel was 'always a consideration' with any form of publication: 'Frequently efforts are made to remove potentially libellous material. The state of libel law impacts every article, moderation decision, tweet etc.; it's always a consideration with any form of publication so it always has an effect on the content'. Changing stories once published was also mentioned:

We have made very few changes to published stories. If objections are raised to a story we usually amend the story as soon as possible in the first instance, in discussion with the person who has raised [the] complaint. On occasion, this has prompted their later support for the site because we treat their concern with respect and attention. (*Journalist - paid, runs own regional online publication, 25 years' experience*)

Again, lack of information was an instrumental factor: 'There are some stories, on occasion, that we are unable to provide all of the information to the public about because we cannot prove truth, despite knowing it. It is very frustrating when you are given several confirmations off the record but without a "smoking gun" cannot run parts of the article in question'. For one respondent, a story would be pulled rather than changed 'if there is any doubt'. It was clear that many of the hyperlocal publishers did

not perceive their content as likely to give rise to a libel risk because they took a neutral stance and avoided certain types of controversial topics, such as disputes. As indicated in the responses above, privacy appeared to have less of an impact than libel. Some were simply unaware of the issues; one said, 'I am also ignorant of privacy law, so again it does not inhibit me. Generally I am not dealing with private matters anyway'. Another had 'no idea what this means'.

Some knew about privacy law, but it had not arisen as an issue, with a number of respondents remarking that they had not experienced this issue, nor were they interested in covering such stories. Some considered it important to avoid stories that might breach individuals' privacy; with one person's response indicating that it would depend on the circumstances. For another respondent, the impact of privacy was 'not technically because of the law but because of a moral sense of what's right. That sort of story isn't something I'd be interested in feeding'.

As with libel, some of the hyperlocal sites seemed very aware of damaging local relationships, to the extent that some would avoid *any* derogatory reference to individuals; two such examples are given below:

...I avoid referring to people in any negative way in my blog – this has extended to not really mentioning people at all. Not sure that's because of a privacy law or just a realisation that these are my 'neighbours' and I want to get on with them. (*Online writer - unpaid, recreational blogging/writing on own site, eight years' experience*)

I would be sensitive to an individual's request not to write about certain aspects of their life. I don't have the journalistic skills or bravado to write a story without the blessing of the individual concerned. I believe I would not ignore an important story entirely though and I would try to find a way to cover the facts. (Online writer - paid, citizen journalism for an organisation's site, 13 years' experience)

Overall, the detrimental effect of privacy law seemed to be perceived as minimal. One person commented that removing names from an article had not had a 'substantive impact'. Several respondents indicated that they were more mindful of the *positive*

suppression of private information and that the reach of privacy law was not of particular concern to them.

Type of content

The questionnaire did not ask respondents detailed information about the nature of the content they published, but of course the purpose and style of material would have a bearing on the type of legal issue they might face. A wider and separate survey on hyperlocal media activity in 2014, mentioned above, provides some useful context here (see Williams et al. 2014; Barnett and Townend 2014).⁹⁹ Of directly targeted hyperlocal publishers (including the publishers targeted for the survey reported in this thesis), just over four out of ten respondents said they had carried out a investigation which uncovered new information in the last two years (n=154), with an average of six investigations for each one (n=55). Asked if any investigative stories were *not* published, just 22 said this was the case, although some reported this had happened on several occasions. Legal factors had a bearing in some cases, although the difficulty of substantiating claims was a dominant factor. With regard to a local campaign that had not been published, the respondent said 'it was because I was afraid of legal action being taken when I don't have insurance or protection'. While around half of hyperlocals said they were not engaged in initiating investigations or campaigns, which would be likely to prove more legally problematic than other types of content (i.e. straightforward information provision), a significant proportion do appear to be undertaking this type of activity. In questions related to resources, several mentioned a desire for legal assistance; one said that legal support 'to keep us clear of potential libel would also be a comfort'.

Extra-legal factors

In the legal surveys conducted for this thesis, there were a variety of other factors – apart from libel and privacy law – given as reasons for why stories are *abandoned* (General n=74; Hyperlocal n=69). As seen in Figure 1, by far the most popular category

⁹⁹ Completed as part of an AHRC-funded project on media plurality; see Williams et al., 2014; Barnett and Townend, 2014.

in the general sample was 'lack of time to pursue story' (66%), followed by 'lack of available information' (57%). The editor's interest seemed to be slightly more influential than whether or not other publications were running the story, although the audience's interest came out above both these factors at 45%. Pressure from management and conflict with advertisers were infrequent choices. A category 'other publications/media organisations *aren't* running the story' was also included, to reflect theories of churnalism, which suggest media organisations are more likely to report stories that everyone else *is* running, but only 7% indicated this was a factor. A similar pattern was seen with the hyperlocal sample (see Figure 2) with 67% citing lack of time and 51% indicating lack of available information was a factor. Again, audience was an important factor, but no one suggested 'management' pressure; very few cited conflict with advertisers and slightly fewer than in the general sample suggested the editors' view was a main reason for abandoning the story. Financial reasons were more important for the hyperlocal group than the general sample.

Figure 1: Reasons for abandoning stories (general sample, n=74)

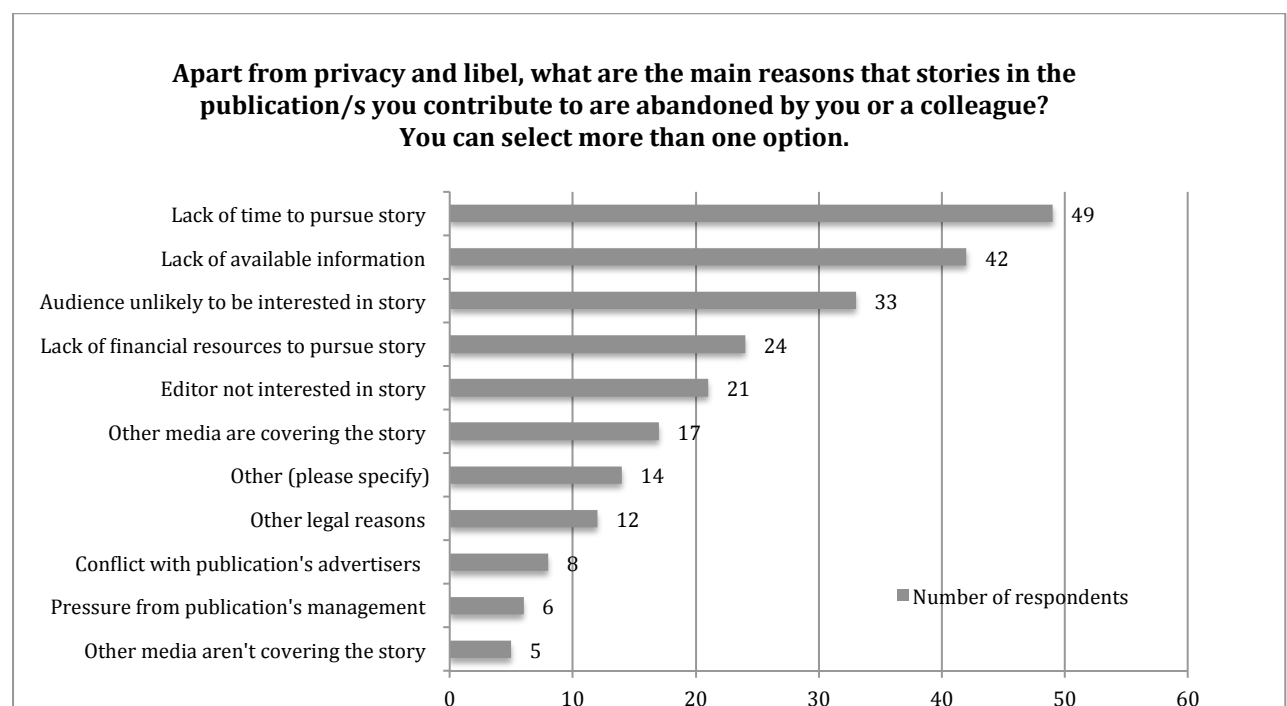
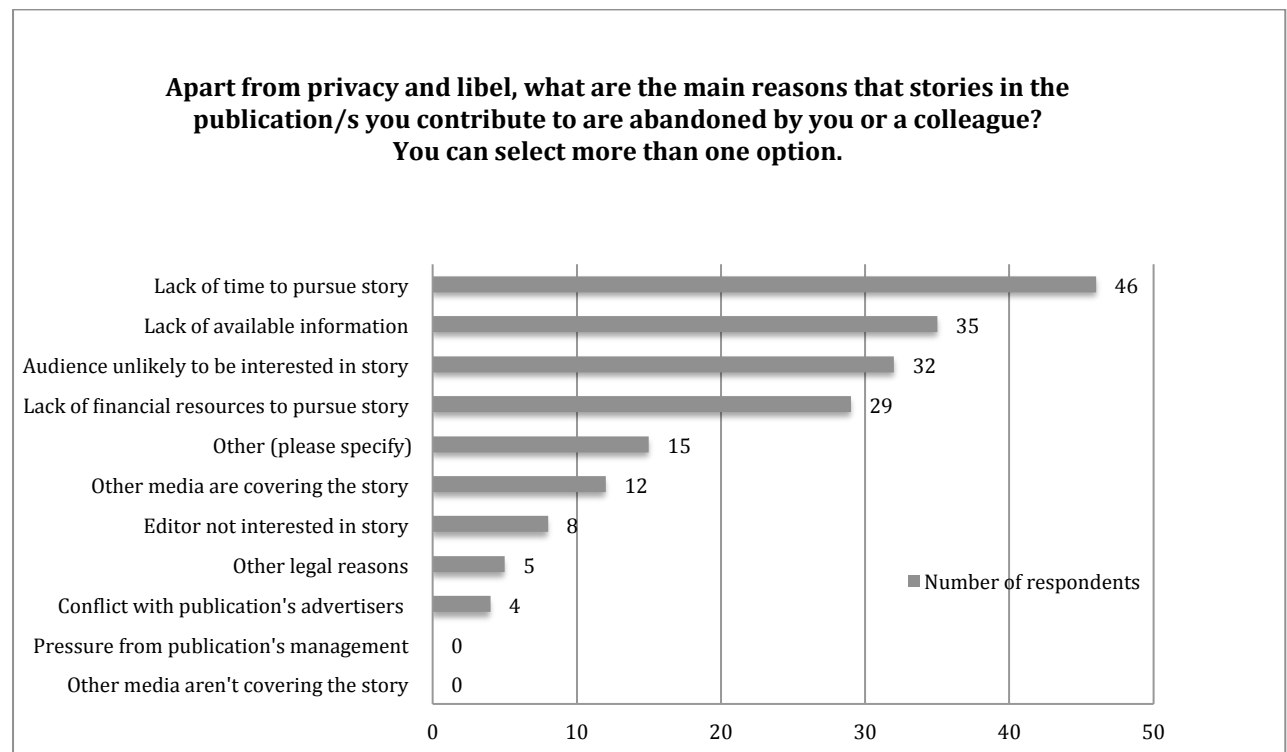


Figure 2: Reasons for abandoning stories (hyperlocal sample, n=69)



Asked a similar question, but with slightly different suggested reasons, about why stories were *changed*, rather than abandoned, lack of information, time and audience interest again scored highly (see Figures 3 and 4). For the general sample, the editor and the way other publications and media organisations covered the story seemed more important than for the hyperlocal sample. Pressure from management was low scoring in the general sample, and non-existent in the hyperlocal sample. Lack of financial resources was more important for the hyperlocal sample. Again the general comments proved illuminating. Other reasons suggested included pressure from public relations officers.

Figure 3: Reasons for changing stories (general sample, n=68)

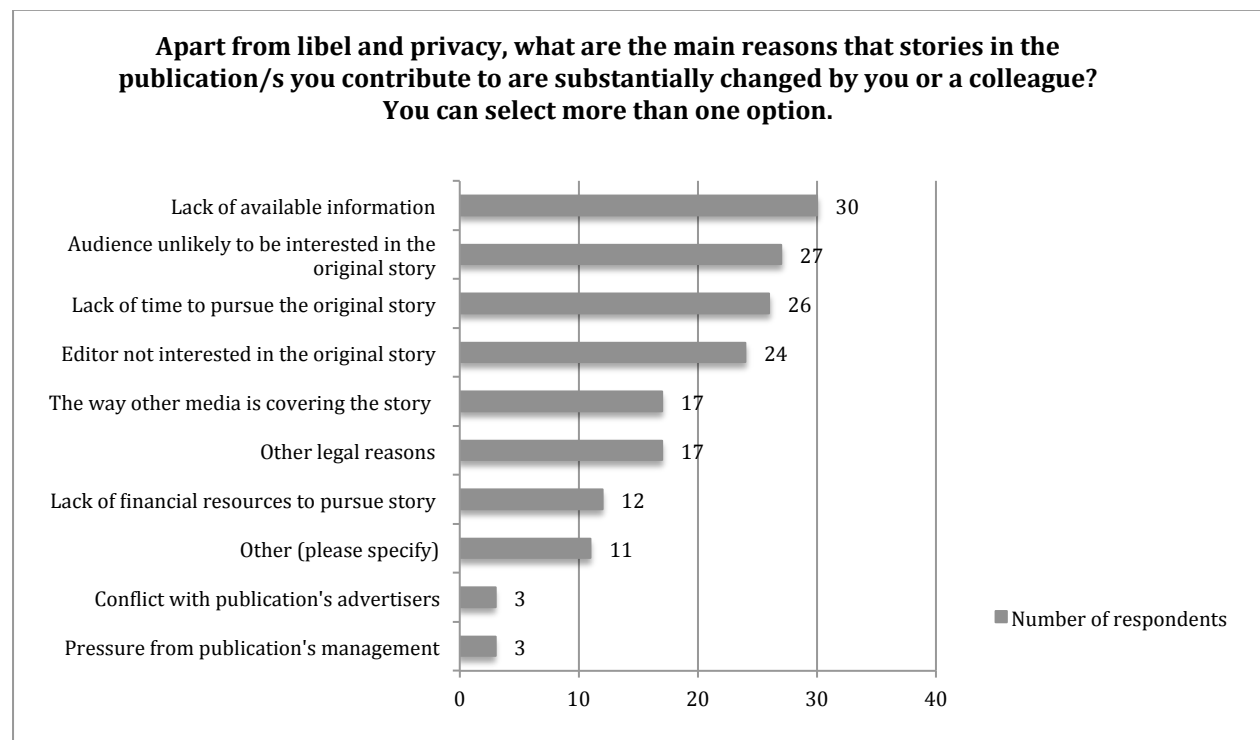
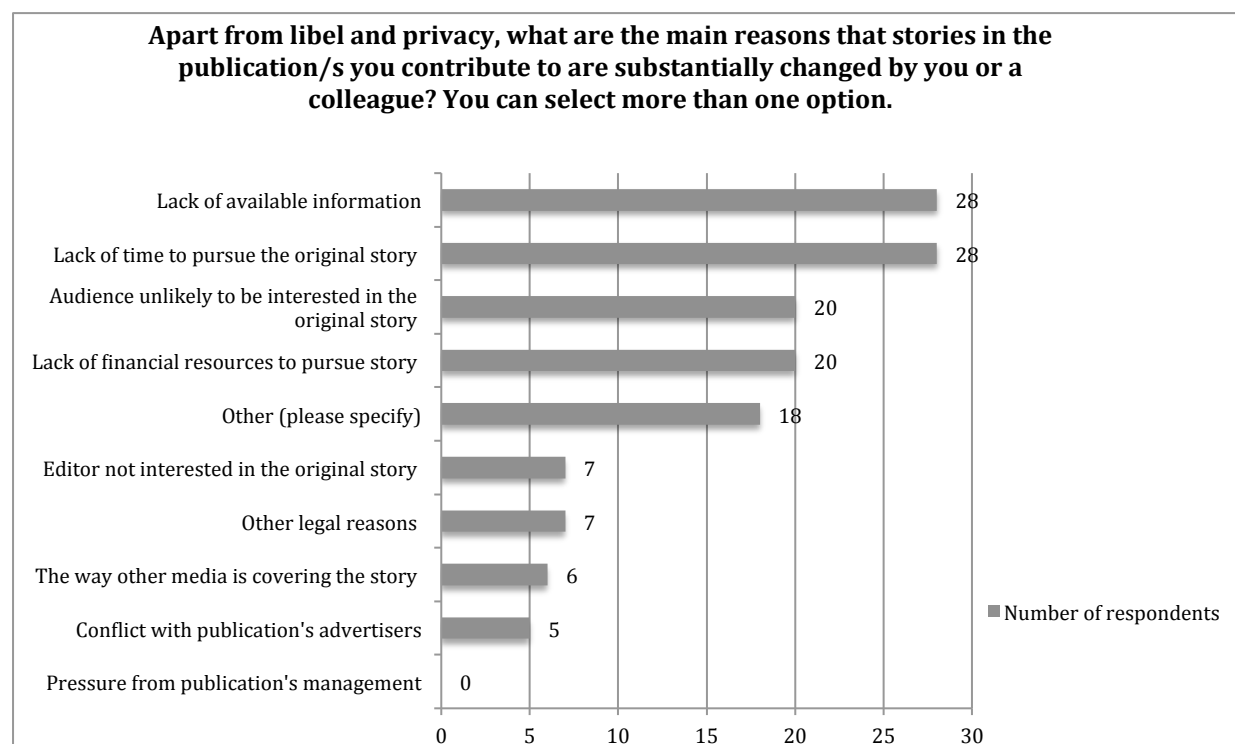


Figure 4: Reasons for changing stories (hyperlocal sample, n=63)



Some described personal pressures, such as 'career aspirations' that meant that they had 'to be careful about matters of political controversy'. The nature of online comment was a deterrent for one respondent: 'Trolls. Often share controversial viewpoints, not illegal or offensive, which collect angry masses with poor understanding of reason or grammar. Sometimes easier to abandon or amend than have to perpetually moderate, especially when comments are defamatory/libellous'. Some described factors associated with their employer or their client, with one hyperlocal even mentioning a 'conflict with own activities'. One noted that because of 'clients', content had to be changed 'to be seen to be toeing the line on certain subjects. This makes it difficult to put across the true view or reality of certain situations'.

One respondent said a far bigger threat to reporting their area of interest (on social issues) was a lack of investment by media: 'I am a freelance journalist. Since 2008 commissioning budgets have pretty much disappeared for all the major titles that I have written for. That's a much greater threat to pursuing the kind of stories I am interested in'. As regards changing stories, one respondent described how a story had to be changed to fit with the publication's target audience: '[Publication's] reason usually because original draft written for too narrow a readership... edited to make accessible and compelling to wider readership'. Or it was altered as more information emerged; some example comments are given below:

While writing a story that is breaking new information can appear on Facebook, Twitter and other blogs and this is sometimes included into the story as it is being written. (*Journalist - unpaid, runs own regional online publication, seven years' experience*)

We made a mistake and need to amend it, or we get an update. (Journalist – unpaid, runs own regional online publication, 14 years' experience)

We amend stories as new information arises. Often, we tend to update the existing story if there are only minor updates, and outline what those updates are. If a news story prompts a significant imparting of new information, we originate a follow up story. (*Journalist - paid, runs own regional online publication, 25 years' experience*)

For hyperlocals, time and financial resource was clearly an issue (something that was also reported very strongly in the separate research on hyperlocal activity; see Williams et al., 2014; Barnett and Townend, 2014a). Comments included these:

There is an ongoing story that is begging to be written save for the fact that it requires many many hours of research to get it right. *(Journalist - unpaid, runs own regional online publication, seven years' experience)*

Apart from myself, I rely on volunteers, one of whom is a retired journalist, but he has less time to give to the project than he used to. We just don't have the people with the journalistic skills to pursue some deeper stories. (Online writer - paid, citizen journalism for an organisation's site, 13 years' experience)

Have stumbled upon very interesting stories but they would take a lot of work to follow up and research properly. If I did pursue such a story I would consider getting liability insurance. *(Journalist - unpaid, runs own hyperlocal online publication, twelve years' experience, former full-time freelance/staffer)*

The publisher or blogger's relationship with the audience was clearly important, and the relevance of the story to the readers a key consideration. Additionally niche interests or 'private causes' had to be considered carefully. One hyperlocal described how,

I find at a hyperlocal level you get odd person [who] is 'obsessed' with one story. It's hard to gauge whether it's an obsession that is relevant and interesting to everyone, or just one person's private cause. I have a community blog so I always say that if they want a platform to publish their own investigations, they can publish their own stuff, under their own name – with one minor exception no-one has ever taken me up on this. *(Online writer - unpaid, recreational blogging/writing on own site, eight years' experience)*

Others said material that would run risk of privacy and libel threats was simply not on their agenda; they preferred 'positive' community-based stories. One described how they were a 'small team with limited resource'; 'investigative stories which may be affected by potential libel or privacy laws are simply not within the remit that we have currently set for our community website'. Another said that their site 'concentrates on positive stories and factual information, I leave negative and controversial stories to the

local press as the site does not generate an income and I don't have the money to be sued!'

Overall, time, lack of information and audience interest appeared to be the main reasons – apart from libel and privacy – for not pursuing stories, or changing content. Several respondents mentioned other areas of law, relationships with subjects (including their agents) and conflicts with employers, with hostile online comment and commissioning budgets also mentioned as deterring factors. For hyperlocals, a lack of financial resourcing was clearly crucial. Interestingly, the behaviour of *other* publications and advertising / management pressure was not perceived as influential as other factors despite recent media studies which have identified a homogenisation of content owing to commercialisation, reduction in resources, the influence of PR and a tendency to replicate copy originating with news agencies (see, for example, Davies 2008; Lewis et al., 2008; Lewis, Williams and Franklin, 2008a; b). One explanation might be that the participants in the survey were often working independently, online (where space limitation is less of an issue) and for small-scale sites, especially those in the hyperlocal sample. A larger sample, among different types of journalists and not framed as a legal survey, might yield quite different results.

5.3. Legal experiences

Having asked about the impact of libel, privacy and other factors on publishers, the questionnaire then turned to the number and type of threats they had experienced over a specified five year period.

*Number and seriousness of libel threats***Table 9: Threats of libel**

During the last five years (1 Jan 2008-31 Dec 2012), have you received any threats of libel action in relation to stories you have been involved in?

	Yes	No
General (n=76)	46%	54%
Hyperlocal (n=75)	35%	66%

Respondents who answered positively were asked how many such libel threats they had received in the last five years. The average was five such threats among the general group (n=29) and six among the hyperlocal group (n=24) although the ranges were large, with one hyperlocal respondent citing 60 alone and one general respondent citing 50. In the general group, they said on average that two such threats had been made through a lawyer (n=29), with an average of one threat being made through a lawyer for the hyperlocal group (n=24). This suggests, although the small sample necessitates care here, that around three in five threats were being made informally to the general group, and five in six to the hyperlocal group. A minority, just one threat received on average during the five years was deemed to be 'serious' in both groups.

Table 10: Threats of libel, in the last year, compared to the year before

Would you say that in the last year, compared to the previous year, the number of threats of libel action you have experienced has increased, decreased or stayed the same?

	Increased	Decreased	Stayed the same	Unable to answer
General (n=33)	6%	6%	46%	42%
Hyperlocal (n=25)	12%	36%	36%	16%

Given the small number of people who answered this question, it would be tricky to suggest a reason for the quite marked discrepancy between the number of respondents in the general and the hyperlocal samples who considered that threats were decreasing. They were also asked about their perception since they began writing for publication.

Table 11: Threats of libel, since began writing for publication

Would you say that since you began writing material for publication, the number of threats of libel action you have experienced has increased, decreased or stayed the same?

	Increased	Decreased	Stayed the same	Unable to answer
General (n=34)	24%	12%	44%	21%
Hyperlocal (n=25)	36%	16%	28%	20%

Again, the sample is small, but it appears that among those who have received threats there was a higher perception of an increase over the time they have been writing, rather than a specified two year time period.

Libel: types of claimants

Table 12: Types of complainants (libel)

From which of these groups have you received threats of libel action in the last five years (1 Jan 2008-31 Dec 2012)? Select all that apply.

	Ordinary individuals	Companies	Politicians (national or local)	Celebrities	The media	Other
General (n=32)	43%	50%	31%	22%	0%	19%
Hyperlocal (n=25)	64%	32%	32%	0%	16%	20%

Respondents were then asked what types of complainants had threatened them with libel action. The results were mixed, mainly split between companies and ordinary individuals, but with celebrities accounting for some of the general sample, and the media responsible for some of the hyperlocal threats. Examples given included 'foreign national', a charity, a lawyer, a 'society figure' and a doctor's surgery. Politicians, national and local, were mentioned in both groups. When asked to specify other groups, the local council was cited once in the national sample, with four separate mentions in the hyperlocal group, including a city council chief executive and a local council staff member.

This is particularly interesting because it is difficult for local authorities to sue, following the decision in *Derbyshire v Times Newspapers* [1992]. This does not

necessarily prohibit individual members from pursuing legal action, nor the funding of such cases by local authorities (see *Comninos, R (on the application of) v Bedford Borough Council & Ors* [2003]). Despite the Derbyshire rule, there have been media reported incidents of defamation interactions between journalists and councils; in 2013 Rutland County Council voted to support its officers in pursuing libel action against three councillors based on a legal opinion that suggested they were able to support such a claim under s. 1 of the Localism Act 2011 (Local Government Association, 2013). In a recent claim brought by a local blogger, Jacqui Thompson, the chief executive of Carmarthenshire council successfully counter-sued in defamation (*Thompson v James & Anor* [2013]). These questionnaire results indicate that under the surface there may be threats made by councils and their members, even if they do not eventually reach court.

Libel: outcomes

Table 13: Experiences of libel action

Did any of these threats lead to libel action (i.e. a claim was issued in court) in the last five years, 1 Jan 2008 - 31 December 2012?

	Yes	No
General (n=33)	12%	88%
Hyperlocal (n=26)	0%	100%

The results indicated, and supporting my previous research (Townend, 2011a), that very few threats result in any 'official' legal action, i.e. a claim being issued in court. Respondents were asked to give the outcomes of the few claims that did reach court. Among the general group, seven outcomes were given by four respondents: three settled with payment of damages and/or costs, one settled without payment being made, one was resolved with an offer of amends, and two were decided at trial. Obviously, there were no such outcomes for the hyperlocal group, where no threats reached court.

For the general sample, the questionnaire did not ask about the outcomes of threats that did not reach court, but it was pointed out to me by one respondent, via email, that this

missed out threats that were settled after content was removed or changed and/or a payment made, without any formal legal claim ever being issued. I added a question to allow for this scenario for the hyperlocal sample. This revealed precisely what my correspondent suggested: that 'unofficial' claims were being resolved in ways that did not involve court. Additionally, it showed that a third of threats were not pursued further by the complainant.

Of 148 outcomes cited by 24 hyperlocal respondents:

- 32 were settled out of court with an apology and/or correction and/or removal of content (and no payment)
- 113 were not pursued further by the complainant
- 2 are still on-going and
- 1 had another outcome

Of course, the numbers are small here, and the respondents are citing incidents from memory, but it serves as a useful indication of what happens to legal threats that are never formally recorded in the courts system. Other journalists have informed me of similar incidents, where a complaint has been resolved by a payment or removal of the content 'in full and final settlement' of the matter prior to it reaching court.

Number and seriousness of privacy threats

Similar questions were asked of privacy threats and their outcomes. Far fewer had experienced threats of breach of privacy and confidence than libel: just 15% of the general sample and 11% of the hyperlocal sample.

Table 14: Threats of privacy action

During the last five years (1 Jan 2008 - 31 Dec 2012), have you received any threats of breach of privacy and/or confidence action in relation to stories you have been involved in?

	Yes	No
General (n=73)	15%	85%
Hyperlocal (n=74)	11%	89%

Among the general respondents who reported how many privacy threats they had received, there were an average of four such incidents per respondent over a five year period. Of the hyperlocal respondents who reported how many privacy threats they had received, there was an average of two such incidents. The majority of threats did not come through a lawyer and in both groups a small minority in a five year period were deemed to be 'serious'. The numbers of respondents here are even smaller than in the libel threat category, so again, the results are indicative rather than conclusive, but of those who had experienced one or more threats of privacy action, over half of the general sample felt that threats had both increased in the last five years, and since they began publishing. For the hyperlocal group, over half felt the level had stayed the same both in the last five year period and since they began publishing.

Privacy: types of claimants

Table 15: Types of complainants (privacy)

From which of these groups have you received threats of breach of privacy/confidence action in the last five years (1 Jan 2008 - 31 Jan 2012)? Select all that apply.

	Ordinary individual	Companies	Politicians (national or local)	Celebrities	The media	Other
General (n=11)	64%	27%	36%	27%	18%	9%
Hyperlocal (n=8)	88%	25%	25%	0%	13%	25%

Similarly to libel, local council and local authority and 'local council on behalf of officers' were given as examples of complainants.

Privacy: outcomes

In the general sample, only one privacy threat led to a claim issued in court that was settled with payment of damages and/or costs. In the hyperlocal group, no threats led to a claim in court. The additional outcomes question for the hyperlocal sample established that of the 19 threats that did not lead to privacy action:

- 7 were settled out of court with an apology and/or correction and/or removal of content
- 2 were settled out of court with payment and an apology and/or correction and/or removal of content
- 0 were settled out of court with payment only
- 10 were not pursued further by the complainant
- 0 are still ongoing

Although there were far fewer privacy than libel claims, a similar pattern emerged where very few, if any, ended up as a formal court claim.

Impact of law on publishing

The number of journalists and bloggers changing or abandoning material is far greater than the number actually receiving threats of legal action, with a small minority experiencing a formal claim issued in court. This would appear to mirror what has been said about regional newspapers: they are concerned about libel and privacy but are very rarely engaged in defending formal complaints (Rasaiah, 2013). However, a lack of incidents in court does not mean that digital journalists and writers do not think about, or react to the pressures of defamation and privacy law, either as the result of direct threats or anticipated threats – whether ‘rightly or wrongly’, as observed by one respondent.

5.4. Policy views

The final part of the survey yielded rich qualitative data, and is perhaps the most useful and reliable part of the results. Respondents were asked about their view of substantive and procedural law and the chilling effect. At this stage, they would have had their previous answers about their legal resources and experiences in mind when answering these final questions. They answered with thoughtful, lengthy responses in the open-ended boxes.

Perceptions of the chill

The chilling effect

As discussed in Chapter Two, the chilling effect concept was at the heart of the libel reform campaign; the phrase is used frequently, with little explanation, in the mainstream media in the context of libel and other legal constraints. Nonetheless, there is not a universally recognised definition. A question was designed to find out if respondents recognised a chilling effect and whether they had even heard of it: “The “chilling effect” is often used to describe the way journalists are deterred from pursuing or publishing certain stories. Do you recognise such a “chilling effect” on your work and if so, what are the causes and how does it manifest itself?”.

General sample: the chilling effect

For some in the general sample it was a simple no, perhaps because of the type of content they produced, with one respondent suggesting their perception might be due to a lack of knowledge. For another respondent, their specialist knowledge of defamation and privacy would prevent them from ‘even thinking’ of the type of stories that would be subject to a chilling effect. Other respondents also explained why they did perceive a chill as such:

I apply the ethical standards that govern issues of privacy confidentiality and veracity required by my organisation and in doing so do not perceive any external chilling effect. (*Online writer - paid, company website, 15 years' experience*)

After 66 years I am not likely to be deterred by anything or anybody. (Journalist - unpaid, own online/print publication, 66 years' experience)

I don't recognise [the chilling effect] – probably due to the type of content I produce, which is mainly legal commentary. (Online writer (lawyer) - paid, for an organisation's site, six years' experience)

I am not 'chilled', mainly because (i) my work is not aggressively critical of individuals; (ii) I am ignorant of the risks. (Online writer - unpaid, for own site, one year's experience)

Others said no, but reflected on the ambiguities of a perceived chilling effect, where it might be something others experience or more senior figures might feel it more keenly than those lower down the food chain. One respondent said it was a 'constant concern' but not a deterrent. Another answered no but raised the possibility that they may 'unwittingly self-censor'. These and other reasons are listed below:

I can't think of an instance where that has been the case, but there is a strong possibility that knowledge of how things have changed alters depending on what level you are at in a newsroom. E.g. a news editor might respond that they are 'spiking' more stories that are being pitched to them, because they know publication would be ultimately unlikely. (Journalist - paid, staff position at regional print and online publication, 23 years' experience)

I don't see it as a chilling effect from a personal perspective: these are necessary constraints on the sort of writing I do. But I recognise that for some bloggers and journalists it is a real issue. (Online writer - unpaid, recreational/academic writing/campaign work on own site, three years' experience)

My work is very strongly researched-based. I strive for clarity and accuracy. And keep libel risk in mind. It is a constant concern – because to err is to be human. But libel risk does not deter me from my proper work. (Journalist - paid, comment and investigative journalism, freelance for online publication/s, 28 years' experience)

For those who did recognise a chilling effect, definitions were attempted, which acknowledged other factors (for example, stretched finances) and the filtering of stories *before* a threat was issued; a flavour of these is given below:

The chilling effect comes right at the start of the editorial process with reporters and news desks, rightly or wrongly, filtering stories where they see potential legal problems. The chilling effect has become more prevalent as the subject[s] of stories have become more confident in complaining to newspapers and newspaper finances have become stretched. (*Journalist - paid, staff position at regional print, radio and online publication, 16 years' experience*)

Fear of litigation means stories are abandoned/altered. Public only gets to hear what celebrity PR/agents want from a 'spin' point of view. (Journalist - paid, freelance for national print publication/s, 10 years' experience.)

My personal experience of 'chilling effect' is usually when I decide not to pursue or publish a piece either due to other media outlets getting the story before I do and thus me being discouraged for not wanting to parrot information or when I am too emotionally affected by a story/news piece to be able to write a balanced piece on it. (*Journalist - unpaid, own website / freelance for national publication/s, three years' experience.*)

This chilling effect could mean that the editor exercised excessive caution. One respondent said: 'I have only seen caution on the part of editors who are reluctant to go with any story that might be controversial – there is a greater desire on their part now to be "safe". It means my stories have to be tailored accordingly in order to be accepted'. Another described the type of threat received; it was not clear how they would react to this type of communication: 'I am just very careful to get things right/legal. I like the phone calls that tell me they have libel lawyers as friends and won't hesitate to sue. It means I have them worried'. Reinforcing earlier comments in the survey about extra-legal factors, it was clear that accessing enough information to stand a story up was a key concern: 'I tend to be careful not to publish news on controversial topics without clear documentary evidence'. Reflections were nuanced, noting the complexities and costs of libel law, with one respondent likening libel interactions to a game of poker:

Financial clout is a bullying tactic used in libel cases by the wealthy. Cases which should never even be raised are 'won' (normally settled out of court) not because the claim is just but because the threat of ruinous legal costs if defended/unsuccessfully is too dreadful to contemplate. It's like playing poker with somebody who can afford to raise you until you are in tears at the table and have to fold. (*Online writer - unpaid, own site, 14 years' experience*)

Another respondent, who reported on a specialist topic, observed that they felt safer in verbal communication than writing:

I always tell the truth, and I generally avoid saying things that could damage people's livelihoods, for other reasons independent of libel law. However I know that even if I stick to the truth and my opinions on matters of public interest, if someone does decide to object, there isn't any limit to how much it can cost ... I would like the standards of [specialist topic] to improve, as they're generally very low, but I tend to ignore the bad and concentrate on enhancing the reputation of the good. I have no qualms about expressing my opinions in verbal conversation, however. *(Online writer - unpaid, own site, specialist interest, 15 years' experience)*

Sophisticated definitions were attempted, acknowledging that the demands of defending a potential libel action deterred the pursuit of some types of story; for example, one respondent described how:

There is a chilling effect in that we come into possession of information from more than one source about an issue in the public interest that will still not have enough documentation to be defended in a libel action. The threat of libel is a deterrent in itself because of the time and expenses which we as a small organisation cannot afford. My main response is to ensure that all information is well attested to and documented before publication, though due to time and expense pressures this means that some stories cannot be pursued to their full extent. *(Journalist - unpaid, own regional online publication, three years' experience)*

Others offered more straightforward definitions, which seemed to presume the legal implications of certain editorial decisions. One simply said: 'Yes [there is a chilling effect], there are some people you simply avoid writing about'; another noted that 'editors are less likely to take copy that is investigative or which exposes wrong-doing'. For one respondent, 'people who want to keep secrets abuse any loophole in the law they can'.

Comments mainly related to libel law, but privacy law was mentioned too. For one respondent this meant avoiding a wide range of activities, including 'certain topics or subjects of stories known to be litigious'; 'making enquiries that might lead to breach of privacy'; 'use of subterfuge in investigations, particularly the use of [under]cover operations'. Some provided an interesting contrast to the material gathered from lawyers in Chapter Four, with one respondent describing the difference between the mindset of the lawyers and the journalists:

An ongoing problem is that media lawyers have a very different mindset to the journalists they advise. Newspapers want to know the boundaries of what they can legally print – they want lawyers to figure out whether a particular story can be published safely, to push as far as they can go. The lawyers don't have that mindset: their goal is to minimise the risk of liability. They will advise against publication whenever they are unsure of the answer, simply to cover themselves, and often do so when the risk is extremely slight. *(Journalist - paid, freelance for print, television and online national publication/s, four years' experience)*

Examples of direct 'chills' were given, either pre or post-publication, with one respondent reporting a threat that had caused an internet service provider (ISP) to take one of their sites down. Another said that stories had been pulled a few times: 'It's the fear of possible action by the body we're writing about that has stopped publication'. One explanation of the chilling effect supports the explanation explored by Barendt, quoted in Chapter Four;¹⁰⁰ there may be a subtle deterrence of certain activity arising from a general fear, rather than from a direct threat:

... although in my day-to-day work I don't encounter [the chilling effect] often, my opinion is that there is a more general, wary atmosphere of not pursuing certain stories, and perhaps a heightened worry of risks that might manifest if a particular story is pursued. The decision of some media organisations not to name certain individuals arrested by Op Yewtree officers while others did, for instance, is one example. *(Journalist - paid - staff position at national print and online publication, five years' experience)*

However, it was clear that not all threats received equal consideration; other factors were taken into consideration, such as 'whether the person is known to have money or not, and is just vaguely threatening or actually uses a lawyer, whether the editors pay any attention to them or not', according to one respondent. 'Wealthy individuals with a track record of suing for defamation', made another respondent's legal advisor 'very wary'.

For some, other factors were more important, such as the negotiation between sources and journalists, or a threat of violence. One respondent commented that it was through lack of editorial interest:

¹⁰⁰ In an interview he discussed how the chilling effect can refer to a 'general fear' of particular lines of inquiry or individuals, rather than the impact of direct deterrents, such as threats.

The way I experience any 'chilling' effect is through lack of interest in certain stories from editors. For example I have been accused of being 'too polemical' by the editor of a publication focused on watching government legislation. I see that editor or organisation as having been 'got at', but have no way of investigating further. And regrettably, no longer take that organisation seriously. *(Journalist - paid, freelance for special interest print and online publication/s, 20 years' experience)*

The impact of privacy and libel could also vary between different types of publications. One respondent suggested that it was 'more difficult writing about companies for a magazine than about the general public, politicians and local authorities etc. for a newspaper'. Respondents drew particular attention to the fact that the threat may not simply be a legal one; the pressure could be commercial, in different ways:

People are much more suspicious and defensive and quicker to try and prevent stories being carried. Most significantly there has been more pressure from commercial teams not to upset certain individuals or businesses. One of the most 'chilling' incidents was a local authority making veiled threats to withdraw advertising if a story was carried. *(Journalist - paid, staff position for regional print and online publication, 13 years' experience)*

The 'chilling effect' is more often lukewarm and comes mainly from the PR representatives of those involved in certain stories. I have never been threatened with legal action re. libel or privacy. It usually takes the form of telling us something 'isn't a story', usually a sign that in fact IT IS a story and should be further pursued. (Journalist - paid, staff position at news agency, 10 years' experience)

In my organisation this primarily comes from senior levels within the business, usually out of fear of a conflict of interest with partner organisations – primarily media rights holders or other stakeholders. *(Journalist - paid, staff position at national television/online publication, five years' experience)*

Furthermore, another respondent said that while they recognised a chilling effect on 'decent journalism' they were also concerned about 'irresponsible' behaviour by journalists:

I do recognise the 'chilling effect'. I also believe that ordinary people who get their lives trashed by irresponsible journalists need redress. I think of Hillsborough where the tabloid press connived with the police and the government compounding the misery of grieving families. Yeah, I am worried about the [chilling effect] on decent journalism – but I'm appalled by the worst excesses of our media. *(Journalist - paid, freelance for special interest online publication/s, 18 years' experience)*

Hyperlocal sample: the chilling effect

Comments by the hyperlocal respondents reflected those of the general sample, but are examined in isolation below. Since more is known about the specific practices of hyperlocal sites than the general sample (Williams et al., 2014; Barnett and Townend, 2014a),¹⁰¹ it is possible to contextualise some of the comments in more detail. First, some were simply not aware of the chilling effect concept, saying that they had never heard of it or did not know enough about it to answer. Others knew about it, but – as with the general sample – did not perceive that it detrimentally affected their work. Some thought they took appropriate measures to avoid legal action; others said that they were unaffected because of the type of material they covered; with comments such as those given below, when asked if they recognised a chilling effect:

No. But then, most of the stories we publish aren't going to lead to libel or privacy issues ... [but] there is no doubt that some [discussion board contributors] do not post comments because of concerns in these areas. (*Journalist - paid, runs own regional online publication, 20 years' experience*)

There is no such thing as a chilling effect in our view. If there isn't good evidence for a story it shouldn't be published. (*Journalist - paid, staff position at regional online publication, 17 years' experience*)

Not an issue for the type of material we are currently including on the site. (*Online writer - unpaid, recreational/campaign work/citizen journalism for a hyperlocal website, three years' experience*)

None of our stories are to do with such private matters. (*Journalist - paid, runs own regional print and online publication, two years' experience*)

Not really, I think if you take a professional approach to your work and use common sense you should be ok. Main error people make is having a personal agenda or trying to back up a theory when the evidence is just not there. (*Journalist - unpaid, runs own hyperlocal online publication, twelve years' experience - former full-time freelance/staffer*)

¹⁰¹ As noted above, information about the publishing activity of the general sample was collected but the small numbers in each category make analysis of the characteristics and a perceived chilling effect difficult.

If we considered a story worth pursuing – and had the time to do it – then we would, regardless of any 'chilling effect' but I don't think we have ever felt a 'chilling effect'. (Journalist - unpaid, runs own regional online publication, 37 years' experience)

For some respondents, there was a general awareness of the concept although they did not cite examples:

Yes [there is a chilling effect]. Those with money behind them know that they can frighten off the citizen journalist from criticising them through a 'scary letter' and threat of subsequent action, which the individual cannot afford to challenge. *(Online writer - unpaid, recreational writing/citizen journalism, three years' experience)*

I haven't realised this effect until the last two years, where it has seriously hampered what I pursue. (Online writer - unpaid, citizen journalism for hyperlocal publication, six years' experience)

Implied threat of action or fear of action while remaining unprotected. Also aware of my own limitations. *(Online writer - paid, citizen journalism for own site, eight years' experience)*

As with the general sample, the mechanics of libel were a concern:

The problem with libel law from my point of view is the potential for a totally disproportionate 'punishment' from the state for what amounts to saying the wrong thing. The state of libel law means every article, every tweet, needs careful consideration, it slows down, and adds an extra challenge. It adds stress and risk. Reporting things people have said where there is no evidence (in writing, video/audio) becomes difficult if there's a chance they might allege reporting is defamatory. You have to be prepared to prove your innocence, to prove what you are saying is true, and that's a very high bar and deters things like reporting on things people have said rather than written down. *(Online writer - unpaid, recreational writing, non-profit campaign work/citizen journalism on own website, 10 years' experience)*

One respondent suggested that an awareness of legal concerns meant that they deliberately avoided certain topics:

I suppose the fact that I don't write stories about individuals like politicians or counsellors [sic] or express an opinion on their actions means I deliberately deter myself from pursuing these stories. I'm really not looking to get sued and leave exposés to big newspapers. *(Online writer - unpaid, recreational writing/citizen journalism for own site, 20 years' experience)*

Others indicated that maintaining relationships with sources and members of the local community might also play a deterring role:

... for the material that I publish there is probably advantage to the public in keeping on good terms with the sources that might otherwise be criticised more severely. (*Online writer - unpaid, resident association news/ four years' experience*)

As a volunteer blogger of a community website – I recognise the 'chilling effect' as I do not wish to aggravate the local community. This results in a reduction of posts. (*Online writer - unpaid, recreational blogging/citizen journalism for own site, three years' experience*)

I'm aware that work that is highly critical of some organisations can have an impact on friends who work in industries related to those orgs; out of loyalty to them I'll hold back on certain stories. (*Online writer - unpaid, recreational/academic/citizen journalism for own site, 14 years' experience*)

One respondent expanded upon this idea, suggesting that community relationships, available time and interest also contributed to editorial decisions:

My community blog is a very neutered thing. I agree that a 'chilling effect' deters me from pursuing some issues, but ... time and interest are two other factors. Plus:

1. At a hyperlocal level, you know you are going to see and know the people affected – what you publish online will be read by my family and friends as well as neighbours. I have no urge to offend people in any way, I just like writing about local things. I try to work from a positive point of view. I live in a reasonably mixed area, so try to promote a positive view of the place – because no-one else does. In a small, passive way, I hope that it improves things a bit, but it is a cop-out, and avoiding the 'chilling effect' has something to do with that.

2. After a point, if you go on about something too much, you just get funny looks. There (so far) are no great issues, and if someone is passionate, for example, about promised funding not coming through for something, I'd encourage them to write and post their own article. (*Online writer - unpaid, recreational writing for own site, eight years' experience*)

As with the general sample, other types of complaints were mentioned; one described how a neighbour had knocked on their door, to complain about a story published about the street: 'Her house was up for sale and she felt it could affect the sale'. Another reported that they had 'received pressure from individuals and public bodies to avoid publishing material that could reflect badly on the local community', giving the example of a story on 'breach of pollution controls in an area with high reliance on tourism'.

As with the general sample, pre-emptive avoidance was mentioned though most comments related to personal decision-making, as they mainly wrote for their own sites:

There have been some things I wanted to publish on my blog but I thought better of it and decided not to do it for fear of being sued. (*Online writer - unpaid, recreational writing for own site, two years' experience*)

Some individuals or companies are well known for litigation and threats. This has led me to not publish stories that were probably in the public interest. However, I have passed on the stories to media organisations with more resources with some success. (Journalist - unpaid, runs own regional online site, three years' experience)

Local authorities were specifically mentioned in the hyperlocal as well as the general sample. This in combination with the answers to earlier questions is very interesting, as it suggests that despite the prohibitive rule in Derbyshire, councils are still perceived as a potential libel concern.

[There is] [c]oncern of someone/organisation (council) having the money to take legal action, even if their case isn't very strong, because the burden of proof would be on us to prove our innocence. This leads us to removing references to people in stories. (*Journalist - paid, runs own regional online publication, 11 years' experience*)

I have witnessed incautious blogging leading to many other local bloggers being taken 'off the air' and further the use of 'rules' to shut down all but the bravest councillors from blogging. One [council] member was stopped three times before giving up altogether. I have also witnessed a blogger go from zero to hero because he was sued which although he 'lost' (settled out of court) ... sadly the blogger has given up and sold his blog as a result. (Journalist - unpaid, runs own regional online publication, seven years' experience)

One attempt by council clerk over report of privileged council meeting (accuracy not challenged, he said it put a councillor at risk and should not have been used). (*Journalist - unpaid, staff position at community radio / site, 25 years' experience*)

Again, direct threats were mentioned, with one respondent differentiating between items for their part-time, non-professional blog and for 'publication' (presumably a mainstream publication):

When someone threatens libel, I tend to back off, even if the threat is not from a lawyer. I can't justify taking the personal financial risk of getting involved in an expensive libel action because of a part-time, unpaid blog. Items for [professional] publication are different, as they go through lawyers before publication and are backed by libel insurance, and can therefore be written more 'robustly'. *(Journalist - paid, freelance for national print/online publications and writes own site, 27 years' experience)*

One described pressure by email and phone. One said they been 'threatened informally' by individuals and companies. Another said a national politician had threatened a contributor with libel action, who was now no longer writing for the site. As a result, the site was 'much less likely to pursue stories against [the politician] ... despite being a rising national politician, because we are aware that he will use the courts to keep his good name'.

One respondent was able to see positive side of the lengthy legal correspondence in which they had been engaged:

In my case it was liberating as I corresponded with a very experienced and prestigious solicitor pursuing a very poor case against me. (I couldn't afford a solicitor). He wrote me many letters pursuing many strategies, over the course of a year. It was like getting a correspondence course from an expert. I could never have afforded to pay for that kind of mentorship. Now I feel very confident about the legal position in everything I write, and how to phrase it so that I can communicate what I want without putting myself at risk. *(Journalist - unpaid, runs own regional online publication, 14 years experience)*

Additionally, the same respondent perceived that giving in could lead to further threats:

I was aware that if I caved I would get more threats in future, as the complainant was well known for his bullying mentality. I resolved to deter him by being a costly opponent. Over the course of the year I received some 15 solicitor's letters ... About three times as many as the local newspaper who had also published a version of the same story.

Readers' comment moderation raised particular issues for one respondent:

Yes, on a couple of occasions I've stopped myself from publishing an article about a local property development or grant application because I can imagine the amount of moderating I'll have to do on readers comments. Comment moderation is an issue. *(Online writer - paid, recreational/citizen journalism for own site and content writing for company sites, 10 years' experience)*

One respondent reflected that despite extensive experience, they were reluctant to publish any content that could lead to legal complaints; in their view, advice tailored for hyperlocal sites would be a useful service:

In my own website, rather than my paid employment, I am ultra cautious. Though I trust my judgment on legal matters implicitly, I do know that it can be extremely stressful when legal problems or complaints arise, and I simply do not want to have the hassle of dealing with such extra-curricular stress. This is one reason that I think hyperlocal bloggers won't ever really be able to hold even the locally powerful to account: if I (an experienced journalist) don't think it's worth the risk of writing contentious stories, then an amateur will certainly not. What would be useful – if hyperlocal citizen news is to have a future – is some kind of very low cost legal advice (not NUJ) perhaps funded by [the charity] Nesta or a similar organisation with an interest in encouraging this area. Or a go-ahead journalism or media school could offer pro-bono help to hyperlocal journalists, in much the way that law schools offer legal centres to members of the public. (*Journalist - paid, staff position at national online publication / publishes own site, 20 years' experience*)

While the hyperlocal sample made similar observations to the general sample, some comments seemed peculiar to the hyperlocal group. For the hyperlocal sample, community relationships seemed to have a greater bearing on the type of coverage; there was particular concern about legal complaints from the local council and the vulnerability of 'citizen journalists'; third party editorial decisions were not mentioned (probably because most of the hyperlocal respondents ran their own sites) and there appeared to be wider concern about a lack of legal resources.

Substantive and procedural law

General sample: views of the law

The final question of the survey asked about libel and privacy law specifically. Although they had already been asked about their perception of the chilling effect, this framed the question differently. It did not rely on their perception of what a chilling effect was, but asked them very specifically how they perceived the effect of libel and privacy law on the publication's public interest information: '*Do you think libel and privacy law prevents journalists and online writers from publishing material that would otherwise be in the public interest? If so, why?*' and offered a final opportunity for general comments. Of course, some comments reflected previous answers but it did allow respondents to be

more specific about the perceived impact of the law. The following responses come from the general sample.

General observations were made about the way in which law favoured claimants over publishers:

The law is heavily weighted towards protecting reputations as opposed to getting as much information that is [in] the public interest into the public domain. *(Journalist - paid, staff position at regional print, radio and online publication, 16 years' experience)*

Our very tough libel laws restrict considerably the information you can safely [publish] even when there is a strong public interest. The Reynolds defence has helped a little, but in practice the cards are still very much stacked against the media and their journalists. *(Journalist - paid, staff position at regional print and online publication, 39 years' experience)*

In English defamation law the onus has long been on the defendant (as opposed to the claimant) to prove their case. The costs also deter bloggers and local papers who are less financially secure to defend themselves against wealthier corporations or claimants. *(Journalist - paid - staff position at national print and online publication, five years' experience)*

A few responses acknowledged that their view was based on anecdote, with one suggesting: 'I suspect that this [prevention] may be the case, but only on the basis of hearsay. It is easy to imagine circumstances [where] privacy and libel considerations point to an opposite conclusion from public interest considerations'. For some respondents, particular organisations and individuals were completely off-limits:

The activities of certain individuals and organisations in my area is an open secret among journalists and others but has not been published, in part due to legal considerations. *(Journalist - unpaid, own regional online publication, three years' experience)*

Some individuals e.g. Lance Armstrong and big organisations e.g. scientologists, have well earned reputation for bullying by legal means. That is a big deterrent. *(Journalist - paid, comment and investigative journalism, freelance for online publication/s, 28 years' experience)*

There was concern about the way in which the law was operationalised or 'manipulated':

... sites can be easily pulled simply by threatening the ISP. It's the easiest way to silence anyone with important information for publication. (*Online writer - unpaid, non-profit campaign work / citizen journalism for own site, six years' experience*)

... in certain quarters people manipulate statute (occasionally successfully) to misrepresent criticism/parody/satire/'calling out'/etc. as harassment or defamation. (*Online writer - unpaid, recreational / academic writing for own site and company site, four years' experience*)

Libel is clearly abused as a strong-arming out of court tactic and fought with financial muscle, not fact. Some law firms are particularly adept in this regard. (*Online writer - unpaid, own site, 14 years' experience*)

Money rather than – or as well as – the substantive law, was identified as a key problem; whether for small or larger publications:

Of course it [law] does [deter public interest reporting], that's mostly what it is for, in practice. If it wasn't a matter of interest to some part of the public, few would bother to sue. Or indeed read it in the first place. To defend such an action, even successfully, is simply too expensive to be risked. On my subject matter it just isn't important enough. (*Online writer - unpaid, own site, specialist interest topics, 15 years' experience*)

I think it puts fear in journalists and in the publication. 'We are too small and a legal case could wipe us out' / 'it is not worth the risk' / 'it is not worth the hassle'. All statements I have heard in the newsroom of my current or previous publication. (*Journalist - paid, staff position at special interest online publication, six years' experience*)

Not so aware of privacy laws preventing the publication of material, but in the case of smaller publications with limited budgets, libel might deter some writers from publishing material because they do not have the resources to employ lawyers to advise them or fight cases. (*Journalist - paid, freelance for special interest print magazine, 15 years' experience*)

... the high cost of legal action makes journalists and editors wary of publishing when being threatened with libel and privacy laws. (*Journalist - paid, freelance work for print / online magazine, 37 years' experience*)

For libel it does. And it's all about the expense of fighting a potential case. Also, having less resource, it's harder to stand stories up well enough to ensure a good defence against potential libel. (*Journalist - paid, staff position for regional print and online publication, 13 years' experience*)

Yes [law is a deterrent] – fear of financial ruin. (Journalist - paid, staff position at online special interest publication, one year's experience)

Cost of defending, even when in the right, can be prohibitive so a threat can be enough to make editors hesitate. (Journalist - paid, freelance for special interest online publication, 14 years' experience)

... the cost of defending a claim is prohibitive. (Online writer - unpaid, recreational, academic, citizen journalism, own site, eight years' experience)

The cost of litigation/insurance too great... (Journalist - paid, staff position at regional television / online publication, 18 years' experience)

The cost of defending yourself and the cost of losing is more than punitive. (Journalist - paid, freelance for national multi-platform publication/s, 18 years' experience)

No-win no-fee libel cases are a disaster as silly claims can be made with no penalty. If you win a case you'd never recover your costs. (Journalist - paid, freelance for special interest online publication/s, 26 years' experience)

I think the current position in which established newspapers and magazines are struggling financially as they lose ads to the digital media will make it more likely that they will try and avoid incurring large legal costs. When I worked for a large magazine publisher, we had legal insurance starting at £30,000. Most cases did not go to court and were settled under this figure, probably for a total of around £10,000. This meant the magazine paid that money out of its budget. So even the threat of a legal which would not go to court was something editors had to be acutely aware of. (Journalist - paid, freelance work for print / online magazine, 37 years' experience)

As with earlier answers in the survey, mention was made of the difficulty of verifying information for the potential defence of a story. According to one, 'We've had stories given to us from inside the council that we couldn't second source – given the subject and the high position the person was in, it just wasn't possible. In this circumstance we wouldn't run, even though we have very high confidence in the source/story – because of the threat of legal action'. Furthermore, there were still barriers even when the story could be substantiated:

I was able to stand the story up and had plenty of evidence and had gone to the owner for comment. A letter was sent by their lawyers and this silenced us from publishing future stories, despite the fact the lawyer looked fairly inexperienced ... However, the managing editor advised

against any future stories on the [company]: frustrating as we had all the evidence and were able to stand the story up. (*Journalist - paid, staff position at special interest online publication, six years' experience*)

This perception was not universal, however: 'If you have good enough facts, you can ultimately find a way to publish,' one said. Definitions of perceived effects clearly varied between respondents. For one, the concern was about 'any restriction on free speech', whereas most appeared to accept that some restriction on speech was acceptable; it was only chilling when there was an unjustified or illegitimate deterrence of publication in the public interest. For example, one respondent described how 'libel laws are important to reduce the publication of malicious falsehoods. But I believe, from secondhand observation, that they [are] being manipulated to prevent the publication of stories which are often in the public interest and often not in any way libellous'.

Another offered a similarly nuanced definition, which recognised a need to balance competing rights: 'There are two points here. First, I think these laws sometimes DO prevent publication of matters of sufficient substantial public interest, and this is bad. Second, the public interest does need to be balanced against private rights, and sometimes the scales will fall on the side of the latter'. Another identified the knock-on effect of illegitimate deterrence: 'Even where a story is true and in the public interest a writ can deter follow-ups by other publications as well as the one breaking the story'. One respondent was concerned that uncertainty led to unnecessary restriction of material: 'To an extent. Fear of prosecution, the ambiguity and grey areas, rather than actual prosecution, is impacting on what is published online'.

Some did not perceive a problem at all ('current affairs is still able to reveal wrongdoing and criminal activity while following the legal framework'), while one respondent was unsure: 'Very difficult to say either way, I'm afraid'. Privacy did not seem to pose such a great concern as libel, although it was mentioned as a 'new weapon'. One respondent suggested that privacy law needed to evolve to protect 'vulnerable' as well as powerful

and wealthy individuals able 'to silence those with less financial muscle than them', noting:

If someone is rich they can bully editors and journalists. It was always the same, but privacy law has given them a new weapon, and it's a very uncertain one as the law is constantly developing. Also rich individuals can threaten the people they guess to be your sources with breach of confidence, and that didn't happen with libel law. Some sources are afraid of the idea of being captured by secret courts and injunctions that come out of the blue. *(Journalist - paid, freelance for national print/online publication/s, 20 years' experience)*

A few other legal and regulatory concerns were also raised without prompt, for example, in relation to Rehabilitation of Offenders, the Leveson Inquiry, contempt of court and Freedom of Information. 'Other legal issues stop publication of stories just as much as libel or privacy,' it was remarked.

It certainly makes you more likely to cover all bases but the most complaints I get regarding online stories is around spent convictions. *(Journalist - paid, staff position at regional print and online publication, 23 years' experience)*

... it isn't just libel – it is also the climate/culture post-Leveson. *(Journalist - paid, freelance for special interest print and online publication/s, 22 years' experience)*

Court reporting restrictions are huge issues. Government press officers refusing to reveal information in a timely manner – using FOI to give themselves a month to answer instead of answering straight-away, is another. *(Journalist - paid, freelance for special interest online publication/s, 26 years' experience)*

As in previous answers, an attempt was made to contextualise the effect of the law, looking at newsroom resourcing and the precariousness of their job situation:

Most journalists, and especially freelancers, live a somewhat precarious life financially. The risk of losing your job or a customer through upsetting an editor or business sponsor is very high, because too many people are chasing too few jobs (the state of the industry, etc., etc.). I'm hoping that the new British law, by forcing complainants to show actual damage, will prove in time to be an improvement. However the fact is these days that unless you are one of a handful of very senior correspondents working for a mainstream broadcaster or print publication, and backed by their reputation, you are not going to take any risk of court action. Most average staffers and freelancers will simply spike a story on the merest suggestion from an editor of problems, because they want to keep their job. The only exceptions are those investigative journalists, and they are very few, who are determined enough and motivated enough, or just plain bloody-minded enough, to find alternative outlets for a story they believe to be worthy of public

attention. Such individuals are all too few. But we need their commitment. (*Journalist - paid, freelance for special interest print and online publication/s, 20 years' experience*)

The risks of publication are too high. Editors prefer stories that work to [those] that may be worthy but are too hard to stand up without significant investment. (*Journalist - paid, freelance for national print and online publication/s, 15 years' experience*)

Indolence and overwork are other inhibiting factors when it comes to pursuing real public interest stories. Also lack of training. And massive outnumbering of journalists by PR execs... (*Journalist - paid, comment and investigative journalism, freelance for online publication/s, 28 years' experience*)

I would argue that fear of alienating advertisers, funders and official sources by taking a critical line to their activities has a bigger chilling effect in which news publications decide to publish. (*Journalist - unpaid, own regional online publication, three years' experience*)

One respondent identified that risk-management varied between organisations, 'the stories we have had problems with have tended be published elsewhere. Our lawyers [are] more careful than others'. As in answers to previous questions, other external influences were mentioned; for one respondent 'it's often the arrogance and sometimes ignorance of publicists and PRs who influence more than law'. One respondent perceived a freedom for bloggers, although it was not clear if they saw this as an entirely positive thing:

Bloggers have filled some of the gap that leaves journalists afraid to publish material, probably because bloggers will have a lack of legal training and may not consider the full consequences of publishing information that has come into their possession. Journalists are often 'shown up' for 'missing' public interest stories broken by bloggers, when it's likely the case that journalists may have certain information but a fear of publishing it in case of legal action. (*Journalist - paid, staff position at special interest print/online publication/s, four years' experience*)

This was echoed by another respondent, recognising two specific factors, legal ignorance and publisher's self-interest: 'I don't think it has as much of an effect as some people think. There are two primary reasons: 1) Many online writers seem almost blissfully unaware of the legal consequences of their writing. If they don't know the law, they can't be chilled by it. 2) There are other, bigger factors that stop people publishing things in the public interest, from access to information to the interests of the

publishers'. Others criticised media decisions that led to a perception of the chilling and a muddling of public interest, with one citing a role for journalistic ethics:

I think a lot of journalists and editors confuse public interest with stories that are of interest to the public. Completely different things. (*Journalist - paid, freelance for special interest online publication, 25 years' experience*)

... the threshold that is crossed from 'interesting to the public' to 'in the public interest' can be effectively established [by] applying sound journalistic standards and ethics, it only becomes blurred when there is a lack of experience or insight and factors other than journalistic ethics are considered. (*Online writer - paid, company website, 15 years' experience*)

Furthermore, for one respondent, a robust response was necessary, to counter the deterrence of public interest publication, 'I think it probably does [prevent public interest publication], but I have little sympathy for those who don't robustly defend themselves when they have the resources to do so'.

Hyperlocal sample: views of the law

As with the question on the chilling effect, the experiences of the hyperlocals reflected those of the general sample, with a few specific patterns. In answer to the same question, 'Do you think libel and privacy law prevents journalists and online writers from publishing material that would otherwise be in the public interest? If so, why?', the issue of costs was raised. For example, it was said they were deterred by the 'fear of crippling costs to defend. Not only that, but the sheer amount of time it takes to deal with even a threat, never mind full-blown action'. Another commented that the 'level of award versus cost of protection is so unbalanced'.

The way in which the law was used caused concern and was felt to be detrimental to public debate; one said: ... 'people with large amounts of money have greater access to the courts/legal processes and can bully people with fewer financial resources'. Other example comments included:

Libel law is certainly far too easy to abuse. A [bankrupt company] threatened to litigate against two bloggers for comment left on their blogs saying that the company were going bankrupt. A

year and half later... *(Journalist - unpaid, runs own regional online publication, seven years' experience)*

I think we'd have more people reporting online, and generally participating in public debate if the risks and challenges – primarily arising from the state of libel law – were not so great. I think there would be a greater volume of citizen journalism if we had less oppressive libel and privacy laws. (Online writer - unpaid, recreational/citizen journalism for own website, two years' experience)

As with the previous question and comments by the general sample, standing up the story and access to information was a crucial consideration: 'If there's a true story that needs to be told then it should be, no matter what the story does. However, there has to be evidence to back up the story, otherwise it's rumour, which can often do the work of truth and cause problems'. But as with the general sample, standing up the story was not necessarily a solution; the fear remained: '[O]n my blog I have been threatened (via a legal firm) by a company that was advertising services that it wasn't providing. I backed off and apologised, and the company is still advertising these services, which do not exist. I would like to pursue them further, but just can't risk a libel action, even though I have a cast iron truth defence'. The substantive law relating to libel was mentioned, although not in as great detail as by the general sample:

Current libel laws based on legislation from decades ago don't reflect the current nature of news and media. Recent examples such as Lord McAlpine being able to pursue every single tweeter for defamation [sic], despite those tweeting not doing so out of malice [but] in ignorance in a split second decision. The perpetrator of such liable [sic] should be held account for the defamation [sic] and all its consequences. *(Journalist - unpaid, runs own regional online site, three years' experience)*

Privacy law did not seem to be as big a concern as libel, although concerns about data protection were mentioned without prompt. As with the general sample, there was also ambivalence expressed by some; for example, one said: 'Yes and no. I think libel and privacy law is misused by people who want to keep their private lives secret for the wrong reasons'.

A lack of knowledge could inhibit – or liberate – publishing activity: ‘Libel certainly does – for the obvious reasons of fear and ignorance of the law (plus generally the lack of the kind of journalistic work that would be the defence against a libel claim – either substantial or Reynolds). Privacy not yet, since most people aren’t aware of the development of the law here’. Other media players played a role too. First, as a means of comparison: ‘The local newspaper pulled their version of the story we were both threatened over from their website. It never made it back again. Even though it would be legal now’; second, in relation to using another means to get a story ‘out there’. Two such examples are below:

If a huge story was discovered by me concerning a huge company which far outweighed the resources of myself, I would have to seriously think hard about running the story. However, if I couldn’t bear the financial risk a libel posed, then I would seek to get the story out there through other means – such as giving it to a rival with heavier backing and legal clout. (*Journalist - paid, runs own regional/print publication, nine years’ experience*)

Although I couldn’t afford a solicitor [following complaint], I did get help. Private Eye were very supportive and also published a version of the story I was being threatened over, which changed the landscape of the complaint significantly. [A law firm] offered me a no-win/no-fee deal, in the event that a claim was lodged. (*Journalist - unpaid, 14 years experience, runs own regional online publication*)

Being a small blogger could both inhibit and liberate: they had particular difficulty in verifying stories, according to one respondent:

Bloggers have to be very careful with reporting ‘facts’ without the power to back them up. I once went with a story about a big payoff in the council and endured over a year of being called a liar ... right up until the accounts were published. I was right but I had no proof I could use without compromising my source. If I had been sued the news would have been secret a year and a half longer. (*Journalist - unpaid, runs own regional online publication, seven years’ experience*)

But another respondent reflected on whether a blogger had more freedom than an institutional journalist; they had observed that a BBC journalist ‘felt constrained by the law – he felt blogger[s] etc. were open to freedom... whether he is right or not [is] irrelevant ... Is it true blogger can do as they wish where mainstream media are constrained?’. The internet more generally was also perceived as a means for

disseminating legally problematic information ('...there will be those journalists who have nothing to lose who will be able to publish "and be damned" and the internet allows these things to come out, no matter what people try to do to stop it') but there seemed to be a greater level of uncertainty among hyperlocal and community publishers; one respondent suggested they would modify the content if a threat was received:

No experience of this [being threatened]. However, in the unlikely event should it happen we would publicise the threat and modify the content. Defending legal action would be too costly for a community website. *(Online writer - unpaid, non-profit campaign work / citizen journalism for an organisation's site, five years' experience)*

If you know the law thoroughly then you can probably work around it if the story is in the public interest. But I don't know the law well enough and wouldn't have the confidence to push it. (Online writer - unpaid, recreational writing for an organisation's site, 15 years' experience)

... a lot of online writers don't have the legal understanding to know if their story was libellous or breaching someone's privacy rights anyway. *(Journalist - unpaid, runs own hyperlocal online publication / former full-time freelance/staffer, twelve years' experience)*

User-generated comments were of particular concern for hyperlocal respondents:

I think there is a significant difference between stories and comments which would be interesting to examine. *(Journalist - paid, runs own regional online publication, 20 years' experience)*

Reader comments can cause aggravation so I'll tend to disapprove the more provocative ones to save myself the hassle. (Online writer - paid, recreational/citizen journalism for own site and content writing for company sites, 10 years' experience)

As an online-only publisher, we have great difficulty dealing with comments and conversations on our stories. We have enabled commenting on our news stories, as we feel it gives our small local community a way to get their views across, but we always hold these for moderation before publishing. We also allow anonymous comments as we believe even if registration is mandatory, people can create fake profiles. Members of the public do not realise that we, as publishers, are jointly liable for their comments and we have received accusations of censorship for not allowing some comments to go up. This is the biggest source of difficulty for us because it is so hard to control comments made by others or to explain to people why their comments cannot be approved. *(Online writer - paid, citizen journalism for an organisation's site, four years' experience)*

Some were very vague about the law: for example, a general fear of 'prosecution', which may have included fear of a civil claim being brought against them, and there was evidence of a great deal of uncertainty:

The initial threat of prosecution for a small publisher, without the support of a large legal team, means we double and triple check every story, however trivial. We have avoided naming individuals involved in some stories to ensure we are not threatened with prosecution, even though our evidence would support the publication of those names. We always err on the side of caution. (*Online writer - paid, citizen journalism for an organisation's site, four years' experience*)

This is an interesting topic and questions asked make me aware that I clearly don't know enough. Although I deliberately don't attack anyone in my blog it does make wonder if I'm covered in reporting the things that I do. (*Online writer - unpaid, recreational writing/citizen journalism for own site, 20 years' experience*)

For those like me without expert legal advice the position as the UK transitions to new libel laws is, I expect, going to be confusing and hard to follow. (*Online writer - unpaid, recreational writing, non-profit campaign work/citizen journalism on own website, 10 years' experience*)

Other contextual reasons were given for avoiding particular lines of enquiry; a lack of 'journalistic instincts', for example: 'I can imagine that someone a bit like me, who was tempted to be a journalist but also wanted an easy life, would be put off by these types of issues'. Others were sympathetic to the role of libel and privacy law, more generally: 'Yes it does prevent stories getting out there. If there were no laws, then certain writers would blog untruths and speculation – they do that already'. For some the question reflected answers to the previous question on the chilling effect: this simply was not something of which they had experience, or felt relevant: 'This does not apply to me as we concentrate on positive news'. The main distinction between the general and hyperlocal answers to this question seemed to be that in the latter case there was a greater level of uncertainty about the nature of the law (reflected in respondents' observations) and fewer resources. Additionally, less nuanced answers were given, perhaps reflecting that hyperlocal and community journalist publishers had spent less time thinking about these issues. Also, as with the chilling effect answers, there was less mention of the internal editorial context (as most self-publish) but a few answers

seemed to take greater stock of the external environment, and the role of other media publishers and the internet more generally.

Finally, a few suggestions were offered for helping bolster hyperlocals' position, including extending qualified privilege in defamation to Freedom of Information responses: 'This is problematic in weighing up publication with little case law in the area as well'. Other suggestions for resources and reform included:

There needs to be a move towards mediation before legal costs are incurred. Whilst no-one should be able to write untrue material about another, the current libel system is massively weighted in favour of the litigant. This manifests itself in bullying behaviour by corporations. Perhaps more access to pro bono legal assistance for bloggers would be useful. *(Online writer - unpaid, recreational writing/citizen journalism, three years' experience)*

People like me should have a central body of resources / union so we can be protected. Large publishers as a rule do not like hyperlocal / niche web sites. *(Online writer - paid, runs own online publication, five years' experience)*

I think the main issue here is one of education. Online writers, especially independent bloggers, just don't have the basic journalism training. *(Journalist - unpaid, runs own hyperlocal online publication / former full-time freelance/staffer, twelve years' experience)*

Overall, the hyperlocal responses suggested a particular desire for co-ordinated resources and support around legal issues, although they were not asked about this specifically. User-generated comments raised particular defamation concerns and there was uncertainty about libel and privacy law in general, with some respondents raising additional legal areas for examination.

5.5. Conclusions

The surveys provided an indication of the number and type of issues faced by digital publishers, although the relatively small size of the sample means that they must be generalised with caution. Findings from the hyperlocal sample, which represented around 17% of the active hyperlocal population, can be cited more confidently. It supported previous research and anecdotal evidence that the vast majority of threats do

not lead to official claims in court. Among the hyperlocal sample, libel complaints were settled before this stage by non-monetary means. The general sample indicated – anecdotally – that more financial settlements were made to complainants. While privacy law appeared to be a growing concern for publishers, it was libel that still dominated their discussion, particularly its high cost and complexity. Hyperlocal respondents identified that user comments raised different problems from ordinary content. Most publishers in both samples did not have legal insurance to cover their publishing activity, but were more likely to if they mainly worked for a larger organisation. Some had not researched the possibility of taking out insurance and many believed its cost to be too high. A lack of resources was keenly felt in the hyperlocal sample, with respondents spontaneously suggesting that formalised pro-bono support for the sector would be useful; a lack of knowledge which could either liberate or cause unnecessary censorship seemed particularly marked.

Libel appeared to affect the publishing activity of the general sample more strongly than the hyperlocal sample (for example, altering or abandoning stories). As noted in Chapter Four, Robertson has commented on ‘newsroom obeisance to the night-lawyer’s credo, “If in doubt, take it out”’ (2013). While this statement seems something of a generalisation – and interviewees pointed to the fact that good in-house lawyers enabled rather than prevented publication – the survey provided an opportunity to examine whether bloggers and online journalists also removed material on the basis of any doubt. Perversely, it appears that respondents with more knowledge and experience could be more significantly affected by libel and privacy. Rather than support and knowledge providing a buffer, their responses indicated that they were more acutely aware of the reach of the law. Another explanation is that more experienced journalists were pursuing more legally problematic topics.

With regard to extra-legal and other influential factors, publishers in the general sample were more likely to mention funding cuts within organisations, or editorial decisions

above them. For hyperlocals, who mainly ran their own sites, preserving good relationships with sources and members of the community seemed to be a key concern; they steer clear of particular topics for fear of the social implications. Respondents from both groups spoke eloquently about the impact of libel and privacy, but the general sample – on the whole – gave more detailed answers about the nature of the chilling effect; it was clear that it did not hold a universal meaning and was interpreted differently depending on their normative views of the law, experiences of others and themselves, and their approach to online writing and journalism.

The surveys also revealed three specific patterns. First, an incidental and unanticipated finding was the frequent mention of local authorities, especially among the hyperlocal group. This was curious because public bodies such as local councils are generally not allowed to sue for libel, although individuals within such bodies can. Nonetheless, there seemed to be particular concern about legal complaints from local councils. Youngs has suggested that restoring the ability of these bodies to sue, but giving protection to a defendant who acts reasonably and removing the right to damages 'with their chilling effect' would safeguard freedom of expression (Youngs, 2011, p.8). From the surveys, however, it is not clear this would reduce the perceived chilling effect, which is felt keenly *despite* public authorities' current lack of ability to sue.

Second, libel still appeared to strongly dominate publishers' experiences and views although many were aware of a perceived rise of privacy. In actuality, very few had experienced the impact of privacy law, or were overly concerned about its reach.

Third, that publishers' views of the chilling effect and libel and privacy law varied widely between respondents within both samples, suggesting that simplified narratives of the chilling effect and the impact of the law do not fully represent what is happening on the ground and how it is being interpreted. Furthermore, some publishers emphasised that their views were based on third party experiences and they had not

necessarily experienced particular phenomena first hand. Nonetheless, there was a clear sense that the law was causing concern and many respondents complained of a negative impact from privacy and libel law, in which they restricted or abandoned material in anticipation of threats as well as altering or removing material once a complaint had been received.

Chapter Five has dealt with the observations and experiences of media lawyers and journalists, and identified different characteristics of behaviour around media-legal decision making in general. Clearly, the way journalists perceive law and legal processes affects their editorial decision making and coverage (or non-coverage) of certain topics. But where do they acquire the information that forms their views, and what information informs the development of legal policy? These questions deserve further attention, especially the mass media's role in communicating the shape of the law. The nature of the raw data and law and media reports informing public perceptions of libel, privacy and the 'chill' are considered in the next chapter.

6. How information flows in media-legal events

How do lawyers and journalists form their opinion of defamation and privacy law, and their perception of a chilling (or non-chilling) effect of the law? This next chapter first sets out the available raw data on defamation and privacy disputes. However, this is not only very limited in its breadth and depth, it is also unlikely to be the main source of information for journalists when forming a perception of the law. Hence the chapter then looks at the mass media and internal discussions between journalists that are likely to have a bigger influence in shaping decisions. In order to expose these influences, this chapter then offers two case studies in what are described as 'media-legal events' and the role of mass media and 'raw' legal data in shaping them: first, in relation to breach of confidence and misuse of private information and publicity around so-called 'super-injunctions' and second, on public figures and libel, specifically the late television personality Jimmy Savile and the cyclist Lance Armstrong.¹⁰²

As well as looking at the influence on decisions and information flow within large media organisations, this chapter pays specific attention to digital actors operating independently of media conglomerates and considers their role in these events. It attempts to go beyond what Benson describes as a 'simple lumping together of factors' (2010a, p.219) by looking at the varying influence of a set of factors in specific situations and asking what types of information shape the development of major media-legal events.

¹⁰² With thanks to my supervisor Professor Howard Tumber for recognising the comparable elements in these two cases; he previously discussed their similarities in a 2013 conference paper which examined 'lone reporters' and investigative journalism, and the social control these types of individuals exert (Tumber, 2013).

6.1. Locating the legal data

This section first sets out the official record on defamation and privacy before moving onto more informal and less predictable information flows. Chapters Four and Five concentrated on qualitative findings, mainly anecdotal and observational information shared in interviews and surveys. Interviewees were also asked about the official data available and whether it would be possible to assess additional data about the number of complaints and outcomes (in the case of publishers), or claims and legal letters (in the case of solicitors). This was an irrelevant question for some interviewees; for example, barristers or the night lawyers who would not be involved in publications' activity on a systematic basis. Some expressed concerns about confidentiality and it appears that records might not be kept systematically (cf. Moorhead, Fenn and Rickman, 2009, p.2).¹⁰³

During the Leveson Inquiry, Justin Walford, in-house lawyer at the Sun, was asked whether he kept a record of pre-publication advice relating to his assessment of a case and the underlying evidence; 'at no time in my career have I made notes about the legal advice that I've given each night. I only – I don't think it would really be possible. There's so much material that comes in. There's so much work,' he replied (Leveson Inquiry, 2012a, p.25). While 'legal marks' would be recorded, these are privileged material so would not be seen in court unless privilege is waived. Walford was asked whether any document or 'audit trail' existed that 'one could look at after the event which could demonstrate how the risk has been assessed or where the public/private interest balance as fallen?'. He said no:

These are decisions that are – and debates that take place from sort of 6 o'clock to 7 o'clock to 8 o'clock, standing at the back bench of the newspaper and looking at copy, looking at proposed headlines and things. There is no record of those. To a certain degree, you have to rely on trust that everyone afterwards, if a problem arose, would remember it. (Leveson Inquiry, 2012a, p.26)

¹⁰³ These issues are addressed from a practical perspective in the Methodology section of the Introduction to this thesis.

My interviews and in-house observation suggest this is the case at other titles too. There were confidentiality issues, as well as the likelihood that newspaper groups would be very reluctant to share this data for commercial and editorial reasons. Beyond threats and complaints information, it would be useful to know how stories are affected by the *anticipated* fear of action, in ways the lawyers might not even know about. But as one journalist and media law specialist observed, 'it's a series of transient and non-recorded decisions made quickly by busy people that leave no trace beyond impressions'.¹⁰⁴

For external solicitors, it was an issue of client consent; they did not feel able to share records 'without express client consent, on each matter'. One claimant solicitor said that they would be unlikely to publicise details of a defamation complaint unless they had formally issued a claim in court. Additionally, it would defeat the point of a privacy case to publicise a complaint. Consequently, none of my interviews, save one, resulted in any hard data. The exception was a solicitor in a media specialist firm who was able to give me access to some claim forms his firm had collected over a couple of years, not limited to their firm's work. It is uncertain whether this was a full set of claim forms for the period, but certain details could be established such as:

- A. Type of defendant: media or non-media
- B. Claimant's and defendant's connection to jurisdiction
- C. Nature of claim

This did not replace the need for the courts data at source (see below), but gave some indication as to the format of the data and how it might be used, and the general patterns in claims over a two year period; access to a full set of data would be immensely useful.¹⁰⁵

¹⁰⁴ Dr Richard Danbury, University of Cambridge, in email conversation, 2013.

¹⁰⁵ Owing to the incompleteness of the data set, I have not included an analysis here, but intend to incorporate the findings in future research. Most valuably, it showed me how useful access to the files at court would be, and what type of research exercise would be possible.

Numerical data would be useful despite the obstacles to collecting it. Numerous committees have taken evidence and produced reports relating to defamation and privacy law, including the House of Commons Culture, Media and Sport Select Committee, the Libel Working Group, the Joint Committee on the Draft Defamation Bill and the Joint Committee on Privacy and Injunctions. The Judiciary has examined the issues too: a committee chaired by Lord Neuberger reported on 'super-injunctions', anonymised injunctions and open justice in May 2011, and Lord Justice Jackson reported on civil litigation costs in January 2010. All of these consultations lacked the necessary data for their analytical purpose, an overt and critical observation in some reports.

While there are several in-depth academic texts that cover this area of law, there are serious limitations to the case law data in the public digital domain. Some data are available through services run by private legal information companies and some is published online free of charge by law firms, but there is no centralisation of substantial data by HMCTS and the Ministry of Justice – to the extent that the authors of the Government's Impact Assessment on the Defamation Bill 2012 felt unable to state the 'true number' of defamation trials in 2010, instead estimating a number based on data about the outcomes of proceedings in the Queen's Bench overall (Ministry of Justice, 2012a, para.2.230, p.51).

Additionally, it should be borne in mind that the courts data – cases in court and claims – represent only the 'tip of a very large iceberg', as Eric Barendt et al. identified in the mid-1990s in relation to publishers' libel experiences (1997, p.41). For media organisations and small online publishers, including social media users, the reach of libel and privacy is far wider than the cases that make it to court: there are unofficial warnings, letters before action, and of course the anticipated threat of a claim, even if it does not materialise, as set out in the survey data in Chapter Five.

In short, there is plenty that is not documented, but what *is* known about the number and type of defamation cases?

Defamation cases

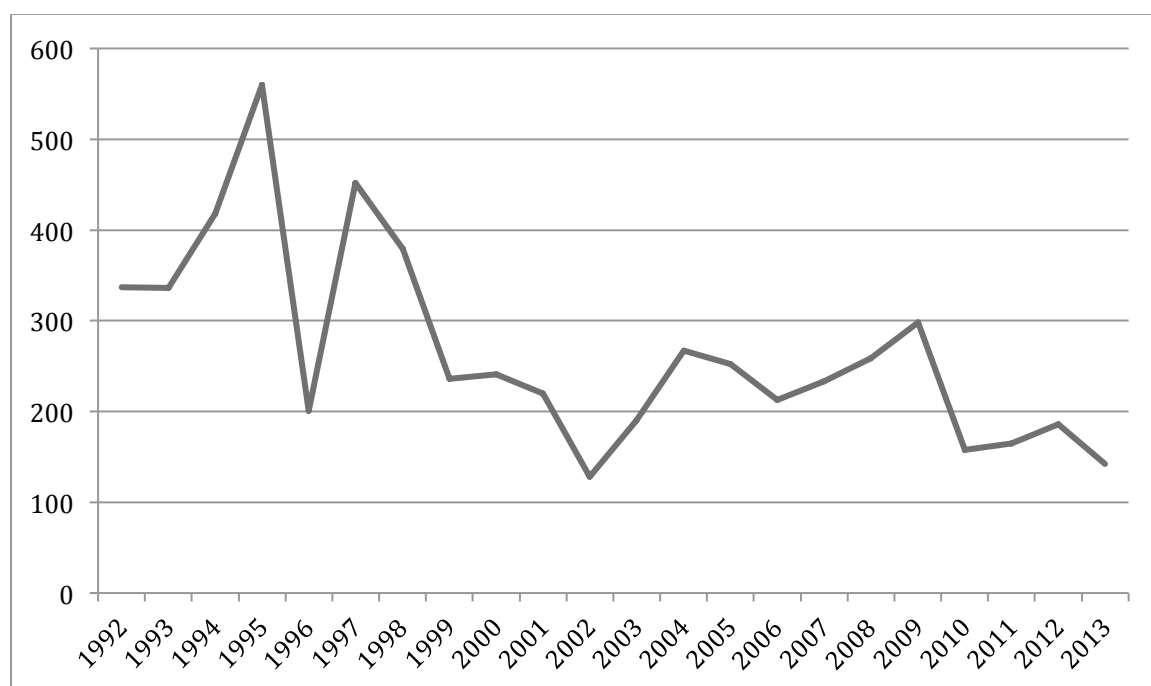
Ministry of Justice Annual Statistics

Each year the Ministry of Justice publishes annual statistics on civil litigation, which include the outcomes of all cases in the Queen's Bench Division of the High Court (number of all Summary Judgments, Judgment by Default, Trials, Interlocutory Applications for Master). These outcomes may not necessarily relate to the number of new claims issued: they could include hearings of claims from one or more years previously. With regard to defamation cases specifically, we are told that the total number of claims issued in each claim value bracket (£15,000–£50,000 or over £50,000 or Unspecified), but not given a breakdown of outcomes, beyond the overall figures. As a result, an official number of defamation trials is not recorded. The media-specialist solicitor firm Reynolds Porter Chamberlain (RPC) compiled a table of these statistics from 1992 onwards, reproduced below. These figures suggest that of the claims that make it to court, only a fraction have a reported outcome. For example, the Ministry of Justice reported 165 defamation claims during the calendar year 2011, but a manual search of cases suggests that there were only around 23 defamation cases that reached summary judgment or full trial in the same time period, not including appeals which completed cases. There is slight fluctuation of the overall number of claims during the period, with a 13% increase between 2011 and 2012, although the most marked pattern is one of decline: from a peak of 560 claims in 1995, since an official count began in 1992, to 142 in 2013, as shown in Figure 5 below.

Table 16: Number and value of defamation claims in London, 2002-13¹⁰⁶

Year	Claims issued in London (Queen's Bench)	Defamation Claims Issued in London	% of all London (QB) Claims issued	£15-50k	£>50k	No value stated
2002	4,394	128	2.91	1	1	126
2003	3,514	190	5.41	22	15	153
2004	4,292	267	6.22	30	31	206
2005	3,841	252	6.56	43	70	139
2006	4,246	213	5.02	24	39	150
2007	4,794	233	4.86	43	45	145
2008	5,173	259	5	43	77	139
2009	5,694	298	5.23	52	62	184
2010	4,864	158	3.24	27	47	84
2011	4,726	165	3.49	28	61	76
2012	5,549	186	3	65	60	61
2013	5,186	142	2.74	37	56	49

¹⁰⁶ Reproduced and updated from a table originally produced by Reynolds Porter Chamberlain LLP (RPC), based on the Ministry of Justice annual statistics.

Figure 5: Defamation claims issued in London 1992-2013

Impact Assessments on the Defamation Bill and Costs Protection Reform

The Impact Assessment on the Defamation Bill assessed the societal and economic costs and benefits of the proposed reforms. On the whole, the Ministry of Justice was unable to 'sensibly' monetise the impacts, as it might have done for a different type of bill, 'in part due to a lack of robust baseline data'. It did not have 'the necessary data and evidence to make quantitative predictions of how relevant variables would change compared to the baseline in future' (Ministry of Justice, 2012a, para.2.2, p.24). This was partly because it could not acquire the information from the parties involved in defamation cases, but it was also not able to access the necessary courts data. For example, its figures on defamation litigation rely on the Ministry of Justice's annual statistics, which, as outlined above, contain only very basic facts about defamation: the number of claims issued, categorised in three value brackets.

The Impact Assessment noted that '[t]here is no official collection of figures relating to the number of defamation cases that reach full trial or on the number of pre-trial

hearings in defamation cases', and that '[d]ata are not collated centrally on the outcomes of defamation claims issued in court'. In addition, it had 'no reliable data on the number or outcome of cases that do not reach court, including damages and costs paid'. It was not able to obtain 'information on the amount spent by media organisations and others on legal advice to help them make decisions about whether to publish, challenge or defend a challenge' (2012, para.2.17–2.23, p.27).

The Ministry of Justice attempted to ascertain the outcomes of defamation cases for 2010. It knew that 3.25% of all Queen's Bench Division cases in 2010 specifically related to defamation, but did not know the outcomes of these defamation cases. It did, however, know the outcomes for all claims in the Royal Courts of Justice. It appears to have supposed that the outcomes of the defamation claims are similar to the outcomes of all claims, resulting in the table below. Its table suggests that there would have been nine summary judgments and six trials concluded *if* the 158 defamation claims were similar to all 4,864 claims in the Queen's Bench Division (Ministry of Justice, 2012a, para.2.56, p.32).

Table 17: Table in Ministry of Justice Impact Assessment

	Volume in 2010				
	Claims issued	Judgment by default	Summary judgment	Trials concluded	Interlocutory applications for Masters
All claims in RCJ	4,864	1,190	269	182	8,113
Defamation claims	158	39	9	6	264
<u>If similar to all claims</u>					

Claims issued in the Queen's Bench Division of the High Court at the Royal Courts of Justice. Source: Judicial and Court Statistics (2010), Ministry of Justice

But these are not the actual outcomes; an important disclaimer is given: the figures only apply 'if similar to all claims' (other types of claim include personal injury and breach of

contract, for example). The document does state, however, that the evidence collected from its analysis of a sample of 145 case files 'would seem to support these assumptions, particularly on the number of trials concluded'. This sample data also comes with a disclaimer: 'As not all case files are completed consistently, these data should be treated as approximate only' (2012, para.2.56–2.58, p.32). In conclusion, the document states: '[W]e would expect fewer than 10 defamation trials a year in total ... Though the true number may be higher than 10, with only 158 defamation claims issued in total in 2010 it is considered unlikely to be much higher' (2012, para.2.230, p 51). In other words, the Ministry of Justice appears to have estimated the number of trials because no central records are kept.¹⁰⁷ A manual search suggests that there were, in fact, three completed full defamation trials that resulted in judgments in 2010 (Inforrm, 2011a).

Furthermore, the Defamation Bill Impact Assessment tentatively noted: 'It appears there are very few jury trials at all, and no systematic data is collected.' (2012, para.2.231, p.51). Lord Lester told the Joint Committee on the Draft Defamation Bill in April 2011 that he 'believe[d] that there has been no jury trial in a libel case in the last 18 months' (2011, p.41 Q 1-40) although this information is not officially recorded by the Ministry of Justice. Unofficially, it is widely known among media law researchers and practitioners that the first libel jury trial in nearly three years took place in June 2011 – *Cooper v Evening Standard and Associated Newspapers*¹⁰⁸, followed by *Boyle v MGN* in 2012, perhaps the last ever, following the introduction of the Defamation Act 2013 which removes the presumption for trial by jury.

The Impact Assessment also contains a useful nine-point methodology for establishing baseline data with which to 'monetise the impacts of each of the proposals'. This baseline data could have been compared with post-reform data (following the

¹⁰⁷ HMCTS has since informed me that it should now be possible to search for defamation trials on the current internal system; I will seek to access this information in future research.

¹⁰⁸ (See Ely Place, no date).

enforcement of provisions in the Defamation Act 2013), in order to assess the impact of the legislative changes. This cannot be done because 'comprehensive (or reliably representative) data [are] available for very few of these factors' (2012, para.2.14–2.15, p.26). In the absence of more extensive data, it is still impossible to conduct this comparative exercise.

A later Impact Assessment on the government's proposals for costs protection reform ran into similar problems; it adds no further data on case outcomes and costs (see below), but adds some very general information about the identity of defendants and claimants: of 127 cases between 2009-13, 46% of defendants fell into the occupational category of 'Information and communication'; 10% in 'Public administration and defence / compulsory social security'; 6% in 'Financial and insurance activities'; 5% in 'Professional, scientific and technical activities'; 4% in 'Arts, entertainment and recreation' and 4% in 'Human health and social work activities' (Ministry of Justice, 2013d, p.9).¹⁰⁹ It does not state, however, how many of these were media organisations. Given that all defamation cases involve communication of some sort, this information is not altogether illuminating; it would be far more useful to have an official record of the specific types of companies and individuals sued (for example, newspaper company / journalist), and the nature of material complained over.¹¹⁰

Data collated for this research

As noted in Chapter One, I was given access by HMCTS staff at the Royal Courts of Justice to view a list of names and numbers of defamation claims issued from 2009-13.¹¹¹ This was a list compiled manually for a pilot costs exercise in the courts, and was

¹⁰⁹ The remainder included: 16% unknown; 2% Education; 2% Real estate activities; 2% Transportation and storage; 2% Wholesale and retail trade / repair of motor vehicles and motorcycles; 1% administrative and support service activities; 1% Agriculture, Forestry and Fishing; 1% Manufacturing (Ministry of Justice, 2013d, p.9).

¹¹⁰ I met analysts in the Ministry of Justice in July 2014 to discuss the availability and nature of defamation costs data; our discussion will be used to inform my future research in this area.

¹¹¹ The data for 2013 appeared to have been aggregated automatically, rather than manually, so I did not include it in the analysis that follows.

not a full list of claims.¹¹² Claims had been classified as defamation related (by including 'D' in the case number, i.e. HQ14D00001) and some were then added manually to the list by HMCTS staff. Each claim number begins 'HQ' followed by the year it was filed (eg. HQ09). I coded each claim by year, which showed the following totals:

Table 18: Sample size of defamation claims, 2009-12

Year	A. Total cases	B. Official no. claims reported by MoJ	% cases examined of official cases
2009	63	298	21%
2010	185	158	117%
2011	96	165	58%
2012	53	186	28%
Total	397	807	

Source: Partial sample of defamation claims issued in RCJ / MoJ annual statistics

The total number of cases for 2009, 2011 and 2012 were significantly lower, and the reverse for 2010, than the official number of claims reported in the MoJ's annual statistics. The Ministry of Justice analysts compiling the annual statistics count claims from the moment it is issued and is given a claim number,¹¹³ whereas HMCTS staff were only noting a sample of claims for the costs pilot list. Data for mid-May to December 2012 was also marked as missing in the HMCTS list. It is also possible that other cases were missing, or a number of non-defamation claims had been included in the HMCTS list; this is impossible to verify without seeing the full Particulars of Claim.

While the data should be treated tentatively, and only represents a sample of claims, it allowed me to search for cases involving media company names, as Barendt et al. did in the mid 1990s. I identified 134 of 397 total cases (34%) that appeared to involve media

¹¹² I am not sure of the basis on which they were recorded, but it may have been only the claims set down for trial.

¹¹³ Confirmed by HMCTS, by email.

defendants, which were then categorised into different media types (not including ISPs; I focused what were obviously journalistic or news media organisations¹¹⁴).

Table 19: Types of media organisations defending claims, 2009-12

	2009	2010	2011	2012	Total
B2B publisher	1	-	-	-	1
Blogger	-	-	-	-	0
Broadcaster	-	5	1	1	7
Magazine publisher	1	2	2	-	5
National newspaper	23	35	23	9	90
News agency	-	-	1	-	1
Other media	-	5	-	2	7
Printers	-	1	-	-	1
Regional newspaper	2	9	3	2	16
Unknown newspaper	-	5	1	-	6
Total	27	62	31	14	134

Source: Partial sample of defamation claims issued in RCJ

These figures must be seen as an *indication* of the number of claims against media rather than a definitive number; they may have been wrongly categorised and I may have missed other media claims where the defendant was an individual, rather than a company.¹¹⁵ Additionally, as noted above, the samples are not complete. My own categories have to be treated cautiously; there were several instances where the newspaper was unknown (labelled just as 'newspaper group' or similar at source).

¹¹⁴ For instance, I did not include the Kordowski litigation, which involved publications on a 'name and shame' website about solicitors and invoked a large number of claims by solicitors during the period, including his own claim against the chief executive of the Law Society; nor Lord McAlpine's claim against Sally Bercow.

¹¹⁵ For some of the records, it was not possible to see the full case name and complete list of defendants owing to the way it was formatted.

However, there are some marked patterns which are worth flagging up, and comparing with Barendt et al.'s findings in the 1990s. The authors of that study also give the caveat that the data might not be precise for similar reasons outlined above: they used an internal record of cases, and 'the process of extracting information' was 'not an exact one' (p.38). They studied only a sample of claims and those 'set down for trial' based on court internal records (the Ministry of Justice official data suggest there were 337 claims overall in 1992, 336 in 1993 and 418 in 1994: see Infromm, 2014). The tables below are adapted from theirs, by way of comparison:¹¹⁶

Table 20: Number of libel writs set down for trial, 1990-1994

	1990	1991	1992	1993	1994	Total
Libel writs	87	37	54	47	64	289
Media libel writs ¹¹⁷	61	29	34	23	48	195
% media writs	70%	78%	63%	49%	75%	67%

Source: Barendt et al. 1997, p.39.

Table 21: Breakdown of media writs set down for trial

	1990	1991	1992	1993	1994	Total
Broadcasters	3	5	8	4	7	27
National newspapers	45	19	20	15	25	124
Regional/Local newspapers	7	1	5	1	4	18
Periodicals	6	4	1	3	12	26
Total	61	29	34	23	48	195

Source: Barendt et al. 1997, p.39.

In the four year period that I studied (2009-12) the highest number of cases by far appeared to be pursued against national newspapers (90), followed by regionals (16),

¹¹⁶ See Table 1 and 2 in Barendt et al. 1997, p.39.

¹¹⁷ I discounted a small number of writs against book publishers reported by Barendt et al. to make the comparison as accurate as possible.

and then broadcasters (7), and other media (7); in the four year period 1990-1993 (inclusive) the pattern was not so different for national newspapers (99) and regional papers (14), although there appeared to be almost triple the claims against broadcasters (20). A higher proportion of defamation claims appear to relate to media than in the later data (65% in 1990-3, cf. 34% in 2009-12), but since I am unable to establish if I am comparing like with like (I do not know if the claims I studied were also 'set down for trial'), it seems unwise to speculate why. While it must be remembered that the data presented (by Barendt et al. and myself) is only approximate and incomplete, it appears that the introduction of a new Defamation Act 1996 has had limited impact on the number of claims brought against media; it would be useful to repeat this exercise again, once the Defamation Act 2013 has been operational for a number of years.

The table for the earlier period relates to print-based cases; the new data might relate to digital and print based publications. However, I only spotted one case against a news blogger in the recent period, although there may have been others against individuals whose names were unfamiliar to me; this does, however, seem to reflect my survey findings in which no hyperlocal respondents reported a formal claim against them over a similar period. It also supports anecdotal evidence that newspapers are more likely to be affected than broadcasters.

Interestingly, of non-media cases I identified, many involved a wide range of defendants: individual names, as well as large corporations, law firms, public authorities (including councils) and government departments. If granted access to the case files I would be able to conduct a much fuller and more reliable study and check the nature of each claim, claimant and defendant.

The only solid data about settlements I was able to obtain relates to the BBC. Following a request made under the Freedom of Information Act 2000 I was supplied with details

of defamation and privacy claims by/against the BBC in the period 01 September 2007 to 31 August 2012, including previous statistics issued to requesters under the Act (see Appendix Five). The total number of defamation cases (33) and privacy cases (11) in this period includes claims brought by the BBC as well as those defended, but it supports first the findings of my survey that privacy related legal action is a less commonly experienced phenomena; and second, that very few claims actually end up in court – my search of the court list for a slightly different five year period (2009-13) revealed only nine cases against the BBC formally brought in court.¹¹⁸ As the outcomes listed in the Appendix shows, the majority of claims are resolved by other means: 'settled' (12), 'dormant' (5) and 'struck out by the BBC' (2). Some were listed in categories that could have involved court: 'struck out', (2) 'resolved' (3), 'won' (1). Eight were 'ongoing' at the time of the request response in October 2012.

Furthermore, a disclosure to another requester in June 2010 revealed that during the period 1 January 2008 to 31 December 2009, of 85 complaints about defamation received, the BBC settled 26 and paid a total of £363,653.05 in costs and £305,056.00 in damages. Of the remaining cases, 54 'were either dropped by the Claimant or were resolved successfully in Court'. Five were ongoing at the time of disclosure. Although it was not disclosed, it seems likely that most of those cases would not have reached court – another disclosure showed that of six formal writs in 2005, four became dormant or were resolved without payment; and two settled with payment – £40,000 damages and £60,000 costs (see Appendix Five).

The Culture, Media and Sport Select Committee

The Culture, Media and Sport Select Committee identified a data problem in its report on libel, privacy and press standards, published in February 2010. With regard to 'libel tourism' it said: 'During the course of our inquiry we asked for information on the number of cases challenged on the grounds of jurisdiction and the success rate of such

¹¹⁸ Although the court list may not have been complete, and cases could have been listed under another party's name even if they also involved the BBC.

challenges. We have been provided with no such information and it was not clear who would be responsible for collecting it.' As a result, it recommended as follows:

[T]he Ministry of Justice and the Courts Service should as a priority agree a basis for the collection of statistics relating to jurisdictional matters, including claims admitted and denied, successful and unsuccessful appeals made to High Court judges and cases handled by an individual judge. We further recommend that such information be collated for the period since the House of Lords judgment in the Bereznovsky case in May 2000 and is published to inform debate and policy options in this area of growing concern. (Culture, Media and Sport Committee, 2010, para.207–208)

The Libel Working Group

The Ministry of Justice's Libel Working Group's report, published in 2010, includes an Annex compiled by the Ministry of Justice summarising 219 unspecified defamation cases issued in the High Court in 2009 (Ministry of Justice, 2010, p.45 Annex B). Of those, 34 were identified as having a 'foreign connection'. This figure differs from the Ministry of Justice's reported number of claims issued in 2009, which was 298, and it sets out six reasons why the data 'needs to be treated with caution', emphasising that the data provide 'a snapshot of cases from one year only' and that it does not 'attempt to give a conclusive picture of the place of domicile of the parties'. It also gives a list of 'libel tourism' cases raised by members of the Working Group, with a footnoted disclaimer that the committee 'recognise[s] that "libel tourism" is a controversial concept' (2010, p.51).

In the absence of a centralised source of information, many of the reports cite each other's statistics. For example, figures given by Jackson LJ (2010b, para.62, p.328) regarding the number of jury trials were used in the report by the Ministry of Justice's Libel Working Group and subsequently repeated in the Impact Assessment (2012, para.2.231, p.51). The figures, according to the Working Group, show that 'fewer libel cases are now being heard with a jury rather than by a judge alone', with four of each in 2008 and four jury trials and nine by judge alone from January to November 2009 (Ministry of Justice, 2010, p.85).

Sweet & Maxwell reports

Each year the legal publisher Sweet & Maxwell releases statistics on the number of defamation cases in court – not claims issued – for the year ending 31 May, and gives additional details about the types of claimants and defendants in a press release. There are limitations to the publishers' data and accompanying analysis.¹¹⁹ One recent press release opened 'Phone hacking scandal leads to lower media appetite for libel risk' (Sweet & Maxwell, 2012), prompting various media reports that attributed a post-Leveson effect.¹²⁰ However, as explained above, the cases in the courts over a 12-month period may not match the claims issued in the same 12-month period; they may have been issued well before the crescendo of the phone hacking scandal, or the beginning of the Leveson Inquiry.

It is a pity that the publisher does not supply more details about the provenance of the data, such as the case names and methodology of categorisation. This would help readers and researchers analyse factors affecting litigation, and any significant changes, for themselves. Of course, as a private company, Sweet & Maxwell is under no public service obligation to provide these reports, so preferably the courts should provide this important information at source.

The Sweet & Maxwell data are important – and therefore included here – because their reports have influenced public and media debate, perhaps more than any other source of defamation data. As an illustration, on 12 June and 12 September 2012 David Morris MP argued in the House of Commons that “‘libel tourism’ has been a burden on our civil legal system’ (Parliament.uk, 2012a, col.202, b, col.371), citing the textbook *Media and Entertainment Law*: ‘In September 2010 the Daily Telegraph reported that libel challenges by actors and celebrities in the London courts had trebled over the past year’. This reference (Smartt, 2011, p.83) sources a report in the Daily Telegraph based

¹¹⁹ See, for example, criticisms raised on Inforrm's blog (Inforrm, 2012).

¹²⁰ See, for example, The Lawyer's coverage (Chadderton, 2012).

on 'figures from the legal information provider Sweet & Maxwell' (Telegraph.co.uk, 2010). In the absence of fuller data, it is difficult to ascertain the foundation of the statement, or the level and type of 'libel tourism' in the courts. More data at source would allow us to check public statements such as these, which may have a bearing on future policy and statute. Researchers would then be able to make more informed analyses of the features of libel law, such as the number of corporations making claims, or the nature of claims involving claimants and defendants based outside England and Wales. It would have allowed the Libel Working Group to look at more than a 'snapshot' of case data.

Privacy cases

Master of the Rolls' Committee on Super Injunctions

As will be explored in more detail in the first case study, there has been a scarcity of official data on privacy injunction applications. In 2011, the Master of the Rolls recommended that the Ministry of Justice, with the assistance of HMCTS, 'should collect data about super-injunctions and anonymised injunctions, in relation to all privacy orders which derogate from the principles of freedom of expression', following widespread concern about their prevalence, and a marked absence of hard data. The Ministry of Justice has released six privacy injunction data bulletins since then on proceedings relating to the publication of private or confidential information: its second most recent report, covering July to December 2013, noted one proceeding considering an application for a new interim injunction, one on whether to continue or amend an interim injunction, no proceedings on whether to issue a final permanent injunction and no proceedings in the Court of Appeal, reported as the lowest number of proceedings since data collection began in August 2011.¹²¹ The most recent bulletin, January to June 2014, trumps that and notes no new injunctions in any category. These figures are not matched to any specific cases. It would be useful to researchers if the cases with a public

¹²¹ Available at: Gov.uk, 2014a.

judgment were identified. These data provisions were made permanent by inclusion in the Civil Procedure Rules with effect from 1 October 2012.

Public judgments

The Master of the Rolls' report also suggested that – in line with the recommendation in *JIH v News Group Newspapers* [2011] – 'judgments and orders containing derogations from the principle of open justice are made publicly available' (Neuberger, 2011, para.4.8, p.55). It suggested that 'an anonymised injunction is a less extensive derogation from open justice, as the proceedings and judgments, subject to necessary redactions, remain in public view' (2011, para.2.26, p.24). Gideon Benaim, a practising media solicitor contends that 'it isn't necessary to publish information about specific cases contemporaneously, nor to publish to the world at large at any time the "not so basic" details of a specific case, in the way that the courts have started to do' and would prefer delayed statistical bulletins (Benaim, 2012). However, the increasingly open albeit anonymised approach advocated by the then Master of the Rolls appears to have assuaged concerns about unnecessary secrecy, and certainly provide greater insight for researchers and journalists into the process of injunction making.

Costs

Jackson Report

General data on defamation costs was included in Appendix 17 of the Jackson Preliminary Report on civil litigation costs (Jackson, 2010a), which has been used to inform subsequent reports and debate. It sets out the anonymised details of 154 libel and privacy claims resolved in 2008 involving nine national newspaper groups, broadcasters and news agencies as well as local newspaper publishers, as compiled by the Media Lawyers Association, which is formed of in-house media lawyers from newspapers, magazines, book publishers, broadcasters and news agencies. This included 137 claims for libel, 15 claims for breach of privacy and two combined claims for both libel and breach of privacy. Details include: the Result; Defendants' costs; Sums paid to Claimant; and whether a Conditional Fee Agreement (CFA) was used. The Final

Report analyses and summarises this data in new tables (Jackson, 2010b, chap.2 [7], p.23 appendix 1, p.515).

When asked by the Culture, Media and Sport Committee in May 2009 about the proportion of CFA cases won by claimants (the committee said it had been informed that this was 98% of CFA cases), Jackson LJ said that there was a limit to the evidence he was able to collect:

It appears, from the evidence which I have received, that claimants are successful in a very high percentage of defamation cases. The evidence which has been supplied to me does not enable me to give you a precise percentage; it is something I would have been delighted to receive, but none of the parties on either side of this particular divide has furnished me with evidence which enables me to confirm or contradict the 98%. I would be surprised if it is that high, but it is certainly a high percentage. (Culture, Media and Sport Committee, 2009, para.213 Qs 918-74)

When asked about data from previous years, he said:

I am afraid I do not have data from previous years. Obviously, it would be helpful if I did have. This [preliminary] report has been prepared in the space of four months and defamation litigation is actually a very small part of the total subject and there are a huge number of appendices dealing with costs in all sorts of areas. I took the view that the contemporaneous evidence is the most helpful, and my appendices give a snapshot of costs being incurred at about the present time. (Culture, Media and Sport Committee, 2009, para.216 Qs 918-74)

Like the writers of the Impact Assessments on the Defamation Bill, Jackson LJ was unable to acquire the necessary data from the parties, and compromised with an anonymised 'snapshot of costs' in the Media Lawyers Association Appendix, which has since been criticised by David Howarth for its 'skewed' data (2011, p.397). Howarth takes issue with the widely accepted belief that libel costs are too high, dissecting both the Jackson appendix and a study published by the Centre for Socio-Legal Studies in Oxford in December 2008, arguing that '[t]here is no evidence that libel costs "regularly reach hundreds of thousands of pounds" or that they are "out of control"' (2011, p.419). In turn, Howarth's own statistical analysis has been questioned by Helen Anthony, who suggests that he paints an 'artificial picture' (2012).

A lack of clarity remains: the Impact Assessment on 'Costs Protection in Defamation and Privacy Claims' proposals echoes the Impact Assessment for the Defamation Bill; under each of the former's costs and benefits headings, it simply states that 'current data and evidence does not enable [costs/benefits] to be monetised', 'due to a lack of robust baseline data and also due to unknown behavioural responses' (Ministry of Justice, 2013d, p.6). To monetise the impacts, it suggests it would need the following information, before and after the reforms:

- The total volume of defamation cases
 - The average damages per case
 - The average legal costs per case for claimants and for defendants
 - The overall success rate of all cases
 - The proportions of defendants and of claimants which are businesses
- In each of the above, baseline information before the reforms would be required as well as estimates of how these variables would change following the reforms. (2013d, p.6)

However, the sources cited do not provide this information. The Impact Assessment repeats and summarises the evidence provided by the Media Lawyers Association to the Jackson Review, noting that the 'information has not been verified by the Government', that in over half of the cases no defendant costs are recorded at all,¹²² and that in some cases, 'no damages are specified or damages are explicitly rolled in with costs in a single payment' (2013d, p.7). The internal case files inspected 'did not capture much information on legal costs, case outcomes nor on damages awarded, had [sic] especially when cases were settled out of court after proceedings been issued' (2013d, p.8). As mentioned above, the only costs data (beyond that supplied in the Jackson Appendix) that I was able to obtain related to the BBC (see Appendix Five). The figures the BBC reports on damages and costs for various years could be used as a point of comparison if comparable data are acquired in future, post-defamation reform.

¹²² This is probably because costs are met in-house when settled quickly. The Impact Assessment also suggests 'this might be because they were claims where the defendant saw immediately that it made an error and admitted liability' (2013d, p.7).

While it is outside the capability of this research to assess the various claims made about costs, its findings support Howarth's observation that 'the reality is that we know little about the costs of libel cases' (2011, p.397). Howarth urges 'a fervent search for reliable evidence' (2011, p.419). This is a commendable suggestion, but one that is easier said than done when legal researchers are faced with the same barriers as the Ministry of Justice in its Impact Assessments on the Defamation Bill and costs protection reform: an absence of official collated statistics and detailed evidence from the parties involved in defamation and privacy litigation.

The data about privacy and libel at source is pitifully limited, with only a fraction of defamation actions formally reported in the law reports. With fewer than ten cases likely to reach full trial each year and no formal and systematic recording of settlements and apologies in open court, the official data cannot be relied on for an accurate picture. Instead, media coverage and online and offline discussion play a vital but potentially misleading role, as will be discussed in the next part of this chapter.

6.2. Case study: Privacy injunctions

Given the limited official data available, how do journalists and bloggers build their knowledge of media legal issues and perceptions of the law? The following section uses two case studies to expose the data, or lack of raw data, underlying high-profile media-legal events. In the first case study, the nature of information and reporting that led to the super injunction scandal of 2010-11 is considered. The second case study examines what information led to the mass deterrence of media stories about two high profile figures, Jimmy Savile and Lance Armstrong.

Context

In autumn 2009, the Guardian piqued the interest of bloggers and tweeters when it reported on the evening of 12 October, that it had been prevented from publishing the details of a parliamentary question. 'The Guardian is also forbidden from telling its readers why the paper is prevented – for the first time in memory – from reporting

parliament,' wrote its investigations editor David Leigh. 'Legal obstacles, which cannot be identified, involve proceedings, which cannot be mentioned, on behalf of a client who must remain secret' (Leigh, 2009). In a subsequent article, this legal obstacle was described as a 'super injunction' by the paper's editor Alan Rusbridger. 'It is time that judges stopped granting "super-injunctions" which are so absolute and wide-ranging that nothing about them can be reported at all,' he said (Robinson, 2009).

This appeared to be the first time that 'super-injunction' entered news vocabulary, although it had been used previously by the Guardian in a piece of satire on celebrity injunctions in 2002.¹²³ Then, in what Rusbridger later described as 'the mass collaboration of total strangers on the web' (Rusbridger, 2009), bloggers and tweeters began searching for the question online, with the writer and blogger Richard Wilson publishing a tweet later that evening, linking to the Guardian story with the message: 'Any guesses what this is about? My money is on, ahem, #TRAFIGURA!' (Wilson, 2009; see Booth, 2009). A post by the influential Guido Fawkes blog was also published, reproducing a parliamentary question by Paul Farrelly MP in full (Fawkes, 2009). With mass tweeting around the #Trafigura hashtag, the injunctive spell was broken and the full story of the Minton Report, a draft report on the activities of oil company Trafigura in Cote d'Ivoire, was duly reported, with the company and its solicitors Carter-Ruck abandoning its effort to secure full injunctive relief against the Guardian for an alleged breach of confidence.

It was a dramatic example of mass legal disobedience online, with tweeters and bloggers actively ignoring the existence of a reported injunction protecting confidential information. Their 'editorial' decisions were informed by the limited details provided by a media report in conjunction with tweets and blog posts by other online writers, and

¹²³ Tim Dowling described how 'A class-action "super-injunction" on behalf of Tom Cruise, Jennifer Lopez, Victoria Beckham, Julia Roberts, Michael Jackson, et al, against everyone they have ever met, will be suspended pending a European court ruling on whether or not celebrities have souls. Campaigners for "Naomi's law" are considering an appeal' (2002).

for those more legally astute, perhaps influenced by an assumption of privilege for parliamentary information. As regards the last point, it is not clear to what extent parliamentary privilege would provide adequate protection: it should be noted that the Guardian had already said it was prevented from reporting parliament and a subsequent report by the Master of the Rolls expressed uncertainty as to 'whether a summary of material published in Hansard which intentionally had the effect of frustrating a court order would be in good faith and without malice' and therefore attract qualified privilege, and if it did not, 'whether it would be protected at common law from contempt proceedings if it breached a court order' (Neuberger, 2011, p. vii). Furthermore, it is questionable whether many tweeters and bloggers – especially those not trained in media law – were fully aware of the possible (if not guaranteed) protection afforded by parliamentary privilege.

Even if it is difficult to establish which were the biggest influences in shaping publishing behaviour, it can be said confidently that the episode reflected the way in which informal online interactions prompted tweeters and bloggers to hit publish in the absence of formal legal advice and mass media information. Since then, there have been numerous examples of similar disruptions around so-called 'super injunctions', which can be used to analyse the underlying information that influences contemporary editorial decision-making.

Rather than loosely talking about the 'blogosphere' or 'Twittersphere' or 'media', this section examines the specific information and actors that have influenced disclosures and perceptions around super and privacy injunctions. It also emphasises the political and social factors involved in media-legal interactions; Trafigura's decision to abort its pursuit of an injunction against the Guardian appears to have been primarily driven by bad publicity, rather than legal facts alone. To understand these social factors, it is necessary to look at the actors and technology involved in the super injunction saga.

Tweeting lawyers

Legal discussion in the online space

Chapter Four discussed the professional duties of media specialist lawyers connected to large media organisations. Their services may also be engaged by smaller outlets or individuals. Beyond this, they also have informal agency within the online space. Many lawyers, media lawyers among them, are using social media to engage in debate or disseminate news. They may give informal warnings – the popular blogger and tweeter David Allen Green has used the suffix #carefulnow to warn his followers of the perils of contempt – but their Twitter and blog biographies often state that these online articulations do not constitute formal legal advice. Despite these disclaimers, lawyers – or those professing legal knowledge (individuals the judiciary calls ‘legal commentators’)¹²⁴ – do, of course, influence the behaviour of others. In a way, it parallels the tension between legal advisors and editorial clients: a stipulated and clear professional distance which is much closer and complicated in practice.

In the context of super injunctions, media lawyers have played an educative role; David Allen Green, writing as Jack of Kent, blogged about the Trafigura injunction reports, but warned ‘It is not for this Blog to publish direct links to these possible disclosures. The court has ordered an injunction, and so there will be nothing on this Blog which will circumvent that’. Later, he wrote about the ‘misconceived’ efforts of protestors outside the Carter-Ruck offices, suggesting they would be better directing their concerns at the oil company directly, reminding them that ‘a lawyer carries out the instructions of the client’ (Green, 2009).¹²⁵ Blog posts by lawyers provided definitions and the detail of the Trafigura case, including the judgment itself (not publicly available elsewhere) (Inform, 2011b) and the perspective of a solicitor, whose firm acted for the claimant

¹²⁴ In its guidance on tweeting from court (Judge, 2011, para.10).

¹²⁵ These comments previously appeared on posts at <http://jackofkent.blogspot.co.uk/>, no longer available since content was migrated to a new site (Green, 2009a; b; c; d).

(Tait, 2011).¹²⁶ In the absence of solid data on super injunctions (as discussed above), media lawyers provided a useful source of information about the nature of this mechanism and the possible extent to which they were in use. In defamation, both claimants and defendants – and their lawyers – have made additional information about their cases available on social media and online, providing interesting insights into settlement negotiations, and commentary on disputes.¹²⁷

Media innuendo

The lawyers' activity fed into, and supplemented, media narratives around privacy and confidence injunctions. In its reporting of the *Trafigura* injunction, the *Guardian* used the term super injunction to describe the way in which the very existence of an injunction could not be reported. However, as noted in the Master of the Rolls' subsequent report on super injunctions, the term became used much more widely in the context of privacy and confidence cases, to describe injunctions where the name or names are anonymised but details of the case are publicly available (Neuberger, 2011; also see Greenslade, 2011). The Master of the Rolls' 2011 report made a distinction between super injunctions and anonymised privacy injunctions but much of the 2009-11 media coverage used the term super injunction for both types: the wholly secret kind and those publicly recorded with some detail about the nature of the application but with the party names replaced by random initials.

Media reports included innuendo about the contents of such injunctions, with hints in newspaper diary pages and *Private Eye*, and more brazen reporting on what was perceived as a proliferation of super injunctions. While some coverage verged on the hysterical, exaggeration was difficult to counter in the absence of hard data. Outrage over the granting of injunctions to protect the private lives of high profile individuals

¹²⁶ On the *Inform* blog, to which I have been a regular contributor.

¹²⁷ Interestingly, one defendant's tweets I had intended to cite here, as an example, are no longer available. Other examples include a lawyer tweeting how they had 'achieved a fantastic six figure settlement' for their clients (Bains, 2013) and a media lawyer's bullish response to a perceived threat of a defamation action against his wife (Lewis, 2013).

was at its height during early 2011, during a period I described as 'super injunction spring'.¹²⁸

Growing from speculation over a small number of interim injunctions that protected the reporting of details about various public figures (some of whom abandoned their efforts and 'outed' themselves), media coverage around super injunctions intensified, culminating in the exposure of the footballer Ryan Giggs as the claimant in the CTB v NGN case. 'There can be few people in England and Wales who have not heard of this litigation', mused Tugendhat J, in a judgment striking out the claim and refusing damages to the claimant in March 2012¹²⁹ (Giggs v News Group Newspapers Ltd & Anor [2012]).

The Giggs case, one of many anonymised privacy claims seeking injunctive relief over the period 2010-11, was notable for the way in which Giggs's identity was revealed. While perhaps common knowledge in media and media law circles, no mainstream publication overtly published Giggs's name after the initial granting of the injunction. However, the information flowed in different ways, online and from publishers within different jurisdictions. On 22 May 2011, the Scotland-based Sunday Herald published an image of the unnamed footballer, with a black strip over his eyes on its front page, with CENSORED printed underneath. He was, as the Guardian reported, 'easily recognisable' (Taylor, Gabbatt and Chrispin, 2011). Additionally, Twitter was by now awash with speculation about his identity. The editor of the Sunday Herald, Richard Walker, explained that he had received legal advice that confirmed his belief that the injunction did not apply to Scotland (Taylor, Gabbatt and Chrispin, 2011). While the paper was not sold in England and Wales, or published online, the front page was easily findable with a Google search, or via social media. English newspapers remained cautious although

¹²⁸ Leveson LJ footnoted a post I wrote using this description (Townend, 2011c), in a speech in Australia 2012; he described how during the 'early part of 2011 England and Wales experienced what was described as privacy and super-injunction spring' (Leveson, 2012e, para.25).

¹²⁹ This marked the end of CTB's litigation against NGN. It could not, however, be seen as a 'victory' for NGN according to the judgment (Giggs v News Group Newspapers Ltd & Anor [2012], para.12, para.90).

reported that the Herald had identified a footballer protected by an injunction. The next day, John Hemming MP stated the footballer's name in parliament, claiming that 75,000 people had named him on Twitter, and the silence was broken (Parliament.uk, 2011). The injunction was still in force, but major news outlets, including the BBC, began to name CTB as Ryan Giggs.

The episode showed that online and independent media *could* break legally enforceable silences. Media reports suggested that the privacy debate 'has mainly played out online' (Taylor, Gabbatt and Chrispin, 2011) and that 'the open defiance of the privacy laws ... has mushroomed to unprecedented levels thanks to the internet' (Daily Mail Reporter, 2011). The narrative is far from straightforward, however. While the internet has enabled mass disobedience, the mass media – including broadcasters and newspapers – maintained a highly significant role in bringing these cases to public and political attention. Furthermore, impunity is not guaranteed. The number of breaches would make contempt or privacy proceedings difficult, but not necessarily impossible if there was a strong desire to bring proceedings, and perhaps, a more sympathetic public view in favour of action. As seen more recently, in the civil action threatened, and in at least one case formally pursued,¹³⁰ by the late former Conservative peer Lord McAlpine Twitter users can be targeted as individuals despite their participation in mass publishing activity (BBC News, 2013b). Additionally, the Crown Prosecution Service successfully pursued prosecutions against Twitter users who named the victim of a sexual offence in 2012 (BBC News, 2012).

The pivotal role of traditional mass media organisations in events like the Giggs episode could change over time, but at the time of writing, the influence of the large media outlets in prompting political reaction and initiating public debate in England and Wales

¹³⁰ Against Sally Bercow, well-known for her media and television activities, as well as being married to the Speaker of the House of Commons (McAlpine v Bercow [2013]).

must be acknowledged.¹³¹ Newer players such as campaigning sites (for example, 38 Degrees and Avaaz) and personal blogs and Twitter accounts provide a chance to expand and question mainstream media narratives but their *direct* influence should not be overstated. In relation to the coverage of the Leveson Inquiry, it was the voices of 'elite' journalists, lawyers, celebrities and – occasionally – academics who have often dominated the conversation: at public events, on social media channels and on mainstream media platforms (Townend, 2013b). While the public has access to the data at source, ordinary public voices may not change the dominant narrative constructed by newspapers, which informs the wider political debate (Townend, 2013b, p.19). Similarly, in relation to the privacy debate, ordinary individuals and alternative media outlets had an opportunity to participate, which they did – loudly – but the mass media's role was far from redundant, in its feeding of the debate, as well as publicising of Twitter disobedience that prompted political discussion and mass awareness of CTB's identity.

The legal record

The previous section discussed political and public perception of privacy related injunctions through the media, but what of the judiciary's role? How did the judiciary influence public perception? In general, judges do not tend to issue press releases to defend their decisions, nor respond to critical media coverage.¹³² They may give speeches and interviews reflecting development of the law, but as Lord Neuberger – himself a regular public speech maker – advised, they 'should obviously be very cautious about publicly discussing the controversies of the day when speaking extra-judicially' (2012, para.35, p.10). Judges' reluctance to interfere in governmental policy

¹³¹ This raises an interesting methodological conundrum for empirical social research; if agenda setting and public debate is assessed solely in relation to mainstream media coverage, it may miss wider public views and activity. One can look at political discussion for further evidence of dominant topics and views, but this also may not be wholly reflective of broader society, and possibly overly susceptible to the agendas of traditional media organisations.

¹³² For the historical context governing extra-judicial statements see McNamara (2012) and Neuberger (2012).

and media coverage, outside their official judicial capacity, helps explain in part the lack of official information in the super injunction scandal, at its peak in spring 2011.

That is not to suggest the judiciary played no role in developing policy, however. Before the Master of the Rolls' committee on super injunctions reported (Judiciary.gov.uk, 2011a), media coverage verged on the hysterical, as newspapers reported the growing fear of privacy injunctions threatening freedom of expression. Some of this coverage was inaccurate or distorted the issues; it was not helpful, for example, to conflate the *Trafigura*-style super injunctions which could not be reported *at all* with anonymised injunctions, for which there were public judgments, but with identities disguised. While the judges granting such injunctions did not respond to the critical coverage through extra-judicial media statements, it could be said their approach to granting privacy injunctions was shifting. They also used their judgments to comment on media coverage; indeed, in *TSE & Anor v News Group Newspapers Ltd* [2011], Tugendhat J observed that '[o]ne of the purposes of handing down judgments such as this is to explain the law and to attempt to encourage informed reporting and to forestall misinformed reporting'.¹³³

In the absence of an accurate judicial account, coverage was left unsubstantiated and unverifiable by researchers (Petley, 2013, pp.20–21). Counting exercises were attempted by newspapers as well as legal blogs.¹³⁴ There is no publicly available figure on how many of the totally secret injunctions were granted in the early 2000s, but from 2010 there was an increase in the number of publicly reported but anonymised judgments regarding privacy injunction applications available online. Perversely, this increased transparency may have given rise to the overall perception that super injunctions were on the rise, although as far back as 2009, media lawyer Mark Stephens

¹³³ For other examples, see a table collated by the Guardian documenting injunction decisions and relevant comments by judges (Butterworth and Wolfe-Robinson, 2011).

¹³⁴ My own efforts, in collaboration with the Infirm blog, are documented on my own blog and the Infirm blog (Townend, 2011b; Infirm, 2011c).

of Finers Stephens Innocent LLP had given a ballpark figure of 200-300 super injunctions 'in force at any one time in the UK' (English PEN / Index on Censorship, 2009). A figure of 240 was given by the Daily Star in April 2011 (Robins, 2011) and an injunctions 'audit' published by the Independent suggested that 333 'gagging orders' had been granted by the courts in the past five years (Milmo, Wright and Morris, 2011). However, the Independent reported that of these, 264 orders granted anonymity to children or vulnerable adults. The remaining 69 orders included 28 that protect men accused of extra-marital affairs and nine that grant convicted criminals anonymity. Clearly, this was a much broader collection of injunctions than those examined by the Master of the Rolls' committee, which looked at injunctions in breach of confidence and privacy proceedings. Elsewhere there were more conservative estimates. In May 2011, the Telegraph and the Daily Star Sunday both claimed that there were 'at least 80' in the past six years and a table by the Guardian lists 40 from 2008-10 (Butterworth and Wolfe-Robinson, 2011).

Given the variety of estimates, what is the true number of privacy-related injunctions? As noted earlier in this chapter, the Master of the Rolls' committee had found that 'there are records of only a limited number of cases; specific records are not at present kept in respect of such matters' (Neuberger, 2011, para.4.2, p.53). At the press conference announcing the report, Lord Neuberger was asked by the Channel 4 News journalist Andy Davies whether he had 'any idea of how many anonymised injunctions and super injunctions have been granted since 2000'. His answer was blunt: 'Since 2000, no. I would not like to say precisely how many ...' (Judiciary.gov.uk, 2011b, p.2). The report did not specify how many were granted in the past, but said that were two with a superinjunction clause (prohibiting reporting of their existence) that had been granted since the John Terry case in 2010: one was set aside on appeal (*Ntuli v Donald* [2010]) and the other was granted for seven days for 'anti-tipping-off' reasons¹³⁵ (*DFT v TFD*

¹³⁵ A non-disclosure or anti-tipping-off order 'prohibits the publication or disclosure of the fact of the proceedings, and any order, made for a short period to ensure that the purpose of the order is not

[2010]). The committee stated that 'applicants now rarely apply for such orders and it is even rarer for them to be granted on anything other than an anti-tipping-off, short-term, basis' (Neuberger, 2011, p.iv). For the second type, anonymised privacy injunctions, the report included basic case details of 18 injunctions with publicly available judgments, which Lord Neuberger said gave a 'fair picture of what is going on' (Judiciary.gov.uk, 2011b, p.2).

Since the Master of the Rolls' report, and as noted above, regular privacy bulletins have documented the number of privacy injunction applications in the previous quarter. The bulletins do not match the figures to the names of published judgments, but they provide a means of monitoring the level of activity (assuming that judges are complying with the instruction to send relevant injunctions to the Ministry of Justice for its data analysis; it would be preferable if the courts recorded and categorised *all* High Court decisions more systematically at the time of issuing). The graph and table below shows the rise and fall of the (relatively small) number of interim and final privacy injunctions granted since the data were first collected (these may not be discrete cases; there may be an overlap between injunctions granted in the same period). From August 2011 to December 2013 there were only two reported injunctions with a super injunction clause, prohibiting the disclosing of proceedings or an injunction (one interim, one final), and only one appeal of an injunction, which resulted in it being discharged by the Court of Appeal. There were no new injunction applications in the most recent period, January – June 2014.

frustrated through publicity'; hypothetical examples are given in the Master of the Rolls' report (Judiciary.gov.uk, 2011b, p.22, para.2.20).

Figure 6: Number of privacy injunctions granted, August 2011-June 2014

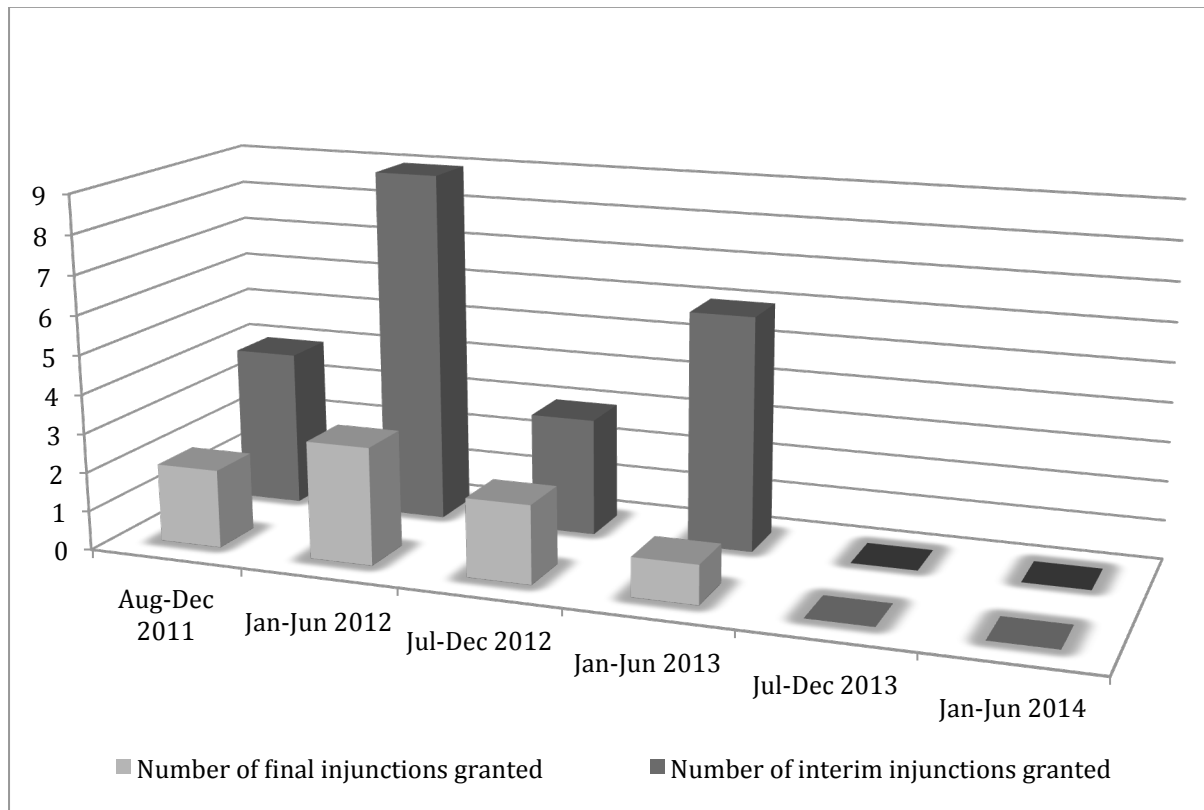
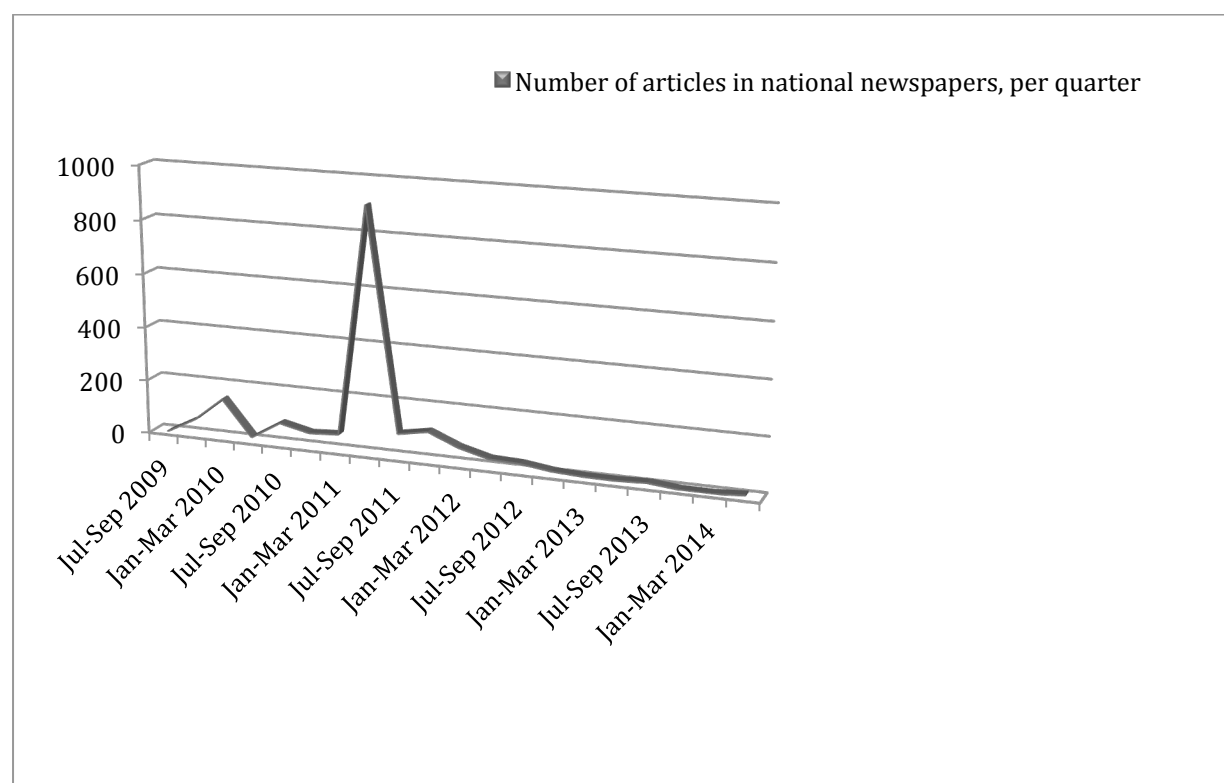


Table 22: Number of injunction applications, August 2011-June 2014

Period	Number of new interim injunction applications	Number of interim injunctions granted	Number of final injunction applications	Number of final injunction applications granted	Number of appeal applications	Super injunction clause
Aug -Dec 2011	4	4	2	2	1 (discharged)	1 (interim)
Jan -June 2012	9	9	4	3	0	0
July -Dec 2012	3	3	2	2	0	0
Jan -June 2013	6	6	1	1	0	1 (final)
July -Dec 2013	1	0	0	0	0	0
Jan-June 2014	0	0	0	0	0	0
Total	23	22	9	8	1	2

Figure 7: Number of articles relating to super injunctions, 2009-2014

Calm after the storm

With increased publication of judgments, and the requirement to publish regular statistics, the public and media are now better informed about the granting of privacy-related injunctions. This is not necessarily reflected in media coverage: since the concentrated coverage around Ryan Giggs and other celebrities during 2011, interest has waned. The graph above shows an *indication* of the level of media coverage on super and privacy injunctions over the period 2010-14, based on the number of national newspaper articles recorded in the Nexis archive mentioning super injunctions.¹³⁶ Coverage peaked in the second quarter of 2011, April – June 2011, with around 908 articles recorded, once duplicates were removed, and dropped off to just one article in January to March 2014, and nine in April to June 2014.

Outrage is more muted elsewhere as well: a super injunction blog and Twitter account which brazenly published full details of supposed protected information (and warned UK readers they should not read the site) has now ceased publishing new content; and there are few recent examples of mass disobedience of privacy injunction breaches. In contrast, there seems to be heightened awareness with regard to contravening reporting restrictions and injunction orders. Of course, this subdued activity is also due to the fact there are fewer injunctions to breach and for the media to discuss.

¹³⁶ A search for (super injunct! OR super-injunct! OR superinjunct!) was conducted for 15 sources in the Nexis UK news database, covering UK national newspapers: Daily Mail and Mail on Sunday; Daily Star; Daily Star Sunday; The Daily Telegraph (London); The Express; Financial Times (London); The Guardian (London); The Independent (London); Independent on Sunday; The Mirror and The Sunday Mirror; The Observer; The Sunday Express; The Sunday Telegraph (London); The Sunday Times (London) and The Times (London), for each quarter 2009-14. High similarity results were removed from the final figure. This serves as an *indication* of national newspaper media coverage over time; the Nexis database may not be fully comprehensive of all titles' content over time (especially before 2000), as discussed by Gaffney (2013) and Baumberg et al., 2012a, p.44) and in their report's Appendices (Baumberg et al., 2012b, p.28). For instance, on some sources in the Nexis UK database, there is a note that that access to certain freelance articles may not be available in particular sources, presumably for copyright reasons.

A clearer picture

This short case study has attempted to set out the information at the roots of the super injunction furore. The mass media and independent social media both contributed to the well-publicised perception that super injunctions were on the rise, and that there was alarming suppression of private information about well-known individuals. An absence of official data only fuelled this further. It is impossible to say whether such concerns were justified, when the details of the full number of privacy and confidence related injunctions have never been made available. While critics such as Gideon Benaim (2012) have raised concerns about the increased availability of anonymised contemporaneous judgments, I suggest that any societal cost is outweighed by the benefits. The new data bulletins and greater availability of judgments provide contextual and accurate public information and lead to better reporting, and the possibility for researchers to verify media and individual claims about injunctions.

Although a scarcity of data restricts the potential for informed analysis, the empirical research presented in Chapters Four and Five suggests that the perception of runaway privacy law does not accord with publishers' actual experience. Both newspaper lawyers and the online journalists and bloggers reported a higher number of libel than privacy threats and actions and, in general, libel seemed to be the great preoccupation, even for those dealing with red-top style content. Additionally, the number of libel actions seems to be far higher than the number of injunction applications recorded in the data bulletins and privacy cases in court, which suggests that threats of privacy actions are lower as well. This could, of course, change over time, especially if the right to reputation is dealt with as an aspect of private life in the English courts; an approach to which the European courts seem increasingly sympathetic (Tomlinson, 2014).

6.3. Case study: Jimmy Savile and Lance Armstrong

The second case study looks at collective media-legal action in another context. This time, rather than mass publicising of restricted content, media and individuals collectively avoided reporting allegations concerning high profile figures. Two examples have been chosen to illustrate this phenomenon. While the allegations concerning each person were completely separate and very distinct in nature, there are a number of characteristics in both cases which are worth comparing. What was it about these cases that led to mass *unreporting* of arguably newsworthy allegations, and what information influenced editorial decisions not to investigate and not to publish?

This section examines the media's treatment of the late television presenter Jimmy Savile and the cyclist Lance Armstrong, and their shifts from a heroic to shamed public figures, and attempts to identify the information flow influencing media coverage of their stories. It will examine the similarities and differences between their treatment by the media, with consideration of various elements: the social control the two individuals exercised through extensive charity work; their legal interactions and threats; the newsworthiness of, and interest in claims about them; and the role of the 'lone reporter' in bringing allegations about their behaviour to light. It is not the first time the comparison has been made; Armstrong and Savile were 'brothers of sorts', according to Simon Kuper, writing in the Financial Times in 2012; in his analysis, 'Each man's story illuminates the other's' (2012).

National treasures

Readers of Private Eye will be familiar with journalists' tendency to bestow 'national treasure' status on high profile figures, for particular sporting or cultural achievements coupled with a personable and media-friendly attitude; the magazine's regular National Treasure column mocks media propensity for such gushing tributes. When Jimmy Savile, the late television presenter, died in October 2011, this unofficial honour was awarded by numerous media outlets for his extensive charity work and unconventional personality. For the Sunday Mirror, 'tributes poured in for national treasure Sir Jimmy

Savile'; for the Sunday People, a national treasure had been 'lost'; these were among examples chosen by the Guardian journalist David Marsh to illustrate the growing frequency of the term in newspaper copy. He put the late Savile and former BBC presenter Stuart Hall, now in his 80s, in 'a whole new genre of former national treasures who have been disgraced' (Marsh, 2013).

The American cyclist Lance Armstrong had a similarly golden profile owing to cycling triumphs and his charity work, notably setting up the Lance Armstrong Foundation which provides support to those suffering from cancer. His nationality disqualified him from national treasure status in the UK, but he received glowing endorsement from the British and American media; he was described as the 'onetime "Golden Boy of American Cycling"' (Forde and Diamond, 2005).

Their revered status was not without a darker edge: for Savile, there were hints of allegations of child abuse; and for Armstrong, speculation that he had blood doped and used performance enhancing drugs. But such rumours were overshadowed by overwhelmingly positive coverage for their perceived achievements in their respective professional fields. When they did eventually fall out of favour – Savile, posthumously, for accounts of widespread sexual abuse of adults and children – and Armstrong, for an admission that he had doped during cycling races – the national treasure and golden boy monikers were repeated again in the media, to describe how they had been previously perceived and publicised.

Libel threats

'I'm known in the trade as Litigiousness'.

(Jimmy Savile, police interview, 2009)

Despite what is now revealed to be extensive evidence relating to the allegations in both cases, Savile and Armstrong received minimal negative attention for many years, before the final exposés that led to their fall from grace. The treasure and golden status may have partially cushioned them, but they were also protected through the spectre of the law, and their deep pockets. Both were unafraid to use libel law to threaten their accusers.

During research of this thesis, it was often difficult to find hard evidence of reported threats against journalists, and to ascertain whether an overt and direct threat had been issued. Documents released during the aftermath of the Savile scandal provided such hard evidence. Police documentation of an interview conducted in 2009 at Stoke Mandeville Hospital recorded Savile's overt and frank admission that he used the law (presumably libel) to deter newspapers from publishing allegations of sexual abuse. Outlining his 'policy' towards allegations, he described how he had previously reached settlements out of court with five newspapers:

I've had five people make allegations that I did something about, because I take them to court, I sue them, and the five I've already sued happen to be newspapers, but they made allegations, and not one of them wanted to finish up in court with me so they all settled out of court. (Surrey Police, 2009, p.3)

He then appears to threaten similar legal action on the basis of the allegations in the interview, in a convoluted and blustering explanation of his legal credentials:

Now this to me, that's going onto day [sic], is exactly one of those things so I've already told my legal people that somebody were going to come and talk to me, they've got a copy of your letter, and the process or the policy will start because if this disappears, so if it disappears it disappears, if it doesn't disappear for any reason then my policy will swing into action at the same time, but the difference with my policy is that my people who are one of the initials after my name is LOD that's a Doctor of Law right, not an honorary one, a real one, that gives me, how shall we say

friends and if I was going to sue anybody which I never actually got round to actually suing because they all run away and say 'shush pay him up', we go not to the local court we go to the Old Bailey cos my people can book time in the Old Bailey so my legal people are ready and waiting, all they need would be a name, and an address, and then the due process from my angle would stop. Because obviously if I'm prepared to take somebody to court and put it in front of a judge then there can't be very much wrong with my policy of behaviour because I've never done anybody harm in my entire life cos there's not need to, no need to. (Surrey Police, 2009, p.4)

Leaving aside the factual inaccuracies (his Doctorate of Law degree from the University of Leeds in 1986 was honorary¹³⁷), and the baselessness of his threats of legal action in the Old Bailey (incidentally, not the court in which a civil claim of defamation would be heard in 2009, if that is what he is threatening), it is a chilling passage in which he appears to be indirectly threatening the police as well as his accusers. He goes on to describe how these 'Old Bailey' proceedings could also involve the police as witnesses:

... because I take everything seriously I've even now alerted my legal team, they maybe doing business and if we do then you ladies will finish up at the Old Bailey as well as everyone else because we want you there as witnesses. Yeah, only a bit of fun. But nobody ever seems to want to go that far because the prospect of me being one side of the court, and the accuser or the newspaper are on the other side of the court and the man in the middle who happens to be one of us (inaudible). (Surrey Police, 2009, p.4)

He describes how he previously settled cases for £200,000, in a statement full of contradictions which ends with him claiming to own the hospital in which he is being interviewed:

So sometimes, the time before I've had them and it cost them like £200,000 because they were out of order and I'm known in the trade as Litigiousness because, which means to say that I'm, willing to pull people into court straight away, no messing, thank you. Now if you're Litigiousness, people get quite nervous actually because for somebody that don't want to go court, I love it. (inaudible). Get into court right, what happened 'oh dear' (inaudible) 'I've been wronged your worship, wrong oh', oh dreadful, oh bang £200,000. Or whatever, whatever. 5 times I've done that, I'd rather not, I'd rather not, I'm not a clever-cloggs or anything like that, what I'd really like to do is to go out, up the dales, have a walk, go training this that and the other but my business won't let you do that. My business there's women looking for a few quid, we always get something like this coming up for Christmas, because we want a few quid for Christmas right, and normally you can brush them away like midges and it's not much of a price to pay for the lifestyle that we're getting you know what I mean, I own this hospital, NHS run it, I own it and that's not bad. (Surrey Police, 2009, p.5)

¹³⁷ It was revoked in 2012 (Leeds.ac.uk, n.d.).

The statements indicate an attempt to deter the police's investigation with grandiose statements about his self-perceived legal and social power; whether or not the police found this credible, they referred the case to the Crown Prosecution Service, which advised there was insufficient evidence to charge (Surrey Police, n.d.).

A fear of Savile's propensity for libel threats is noted elsewhere. The former Sunday Mirror editor Paul Connew has described how the Sunday Mirror did not pursue allegations made by two victims in 1994, for fear of a libel suit. According to a report in Press Gazette, Connew blamed a lack of resources at the post-Maxwell Mirror, and the fear of a 'starstruck' jury at any libel trial (Turvill, 2013c). In an interview with the Associated Press (Satter, 2012), Connew described how the victims were worried about the prospect of giving evidence in any potential trial:

'One of them said memorably: "Who's going to believe us in the witness box against Jimmy Savile? He's friends with Prince Charles, Princess Diana ... He's been blessed by the pope,"' Connew said. He told The Associated Press that Britain's strict defamation laws meant that he was left with little to run with. 'They had to be prepared to go on the record and face what would've been an almost certain libel action from Savile,' he said.

Similarly, the late former tabloid editor Brian Hitchen partially blamed the lack of reporting (he said he had known of allegations for 45 years) on Britain's libel laws that 'too often help make those like Savile untouchable' (2012). Although Hitchen did not expand this point, it is likely his view is based on two factors: the high cost of defending a claim and the structure of English libel law, in which the defendant rather than the claimant bears the burden of proof. To rely on a defence of truth, they must prove that the allegations are substantially true, deemed by critics (such as those campaigning for libel reform in 2009, see Chapters One and Two), to be unfairly burdensome on defendants. Whether Savile would have been successful in the libel courts was never tested because he settled the complaints before it reached that stage. It is often difficult to definitively argue that libel has deterred investigation of a particular story; here, Connew's description makes a direct connection between an editorial decision and a

fear of potential libel action. More starkly, there is evidence of Savile's ill-informed bluster on police record and his claim to have settled with five newspapers. If, as seems likely, he shared his 'policy' with journalists as well as police officers, it is probable they would have been scared of running stories. What is less explicable, however, is why they ran such sycophantic and glowing coverage in its place, and why they did not cover the story for over a year after his death, when the threat of libel action was unarguably removed.

'I think we're 10-0 in lawsuits right now.' (Lance Armstrong, 2006)

'To be honest, Oprah, we sued so many people I don't even [know].' (Lance Armstrong, 2012)

Lance Armstrong also reached for libel in an attempt to put off reporting into allegations of doping. In the English courts he successfully sued the Sunday Times, in legal action reported to have cost the paper £1 million (O'Carroll, 2013). While the case never reached full trial, following two High Court decisions and a Court of Appeal ruling, the Sunday Times decided to try and settle the case. With a high level of meaning set by the court – that the Sunday Times was accusing Armstrong of being a cheat and a liar – the publication reportedly decided it could not risk a full trial: 'it did not believe the evidence it had, although strong, was enough to satisfy a jury that Armstrong was a cheat' (O'Carroll, 2013). An initial effort to reach an out of court settlement failed, but a deal was later negotiated by the paper's then managing editor in the UK while Armstrong's lawyer was visiting on a golf trip.

The evidence of Armstrong's threats can be found in media reports: a 2006 interview reported the boast that he was winning 10-0 in lawsuits, for example (USA Today, 2006). The results of his threats are evident in the unfounded legal action he pursued. Whereas the details of Savile's settlements remain unclear, the details of Armstrong's

case against the Sunday Times is well-reported and documented online (a few days after the announcement of a new settlement between the Sunday Times and Armstrong in light of the cyclist's confession, one of the named defendants in the original litigation, the journalist Alan English tweeted a picture of the 2004 libel writ, quipping that he planned to frame it in his downstairs toilet (English, 2013)). Furthermore, Armstrong has publicly commented on his legal tactics, following his admission of doping. Asked about his litigiousness during his confessional interview with Oprah Winfrey in 2012, he admitted he didn't even know how many people he had sued over allegations of doping. Discussing his treatment of the masseuse Emma O'Reilly, who he admitted he had bullied following her claims about his use of the drug cortisone, he said: 'I don't feel good. I was just on the attack. The territory was being threatened. The team was being threatened. I was on the attack' (BBC Sport, 2013a).

The evidence suggests that Armstrong's tactics worked; the Sunday Times' journalist David Walsh was unable to find a publisher for his *LA Confidential* book¹³⁸ in the UK and national titles avoided the story. Even the story that the Sunday Times was sued over was not a full extract from the book, according to the Guardian's extensive report of the litigation (O'Carroll, 2013). Like Savile, Armstrong used legal threats to deter journalists from pursuing a legitimate public interest story. Unlike Savile, he has since admitted to wrongdoing on public television. He also told Oprah Winfrey he would be willing to apologise to Walsh (BBC Sport, 2013b).

Additionally, there are some differences in the media coverage in the Savile and Armstrong cases; while both received favourable coverage in the UK press, the Armstrong allegations were better reported and more publicly acknowledged in the media, albeit it in a very limited way: in Walsh's book, co-written with the French journalist Pierre Ballester and published in France, and, separately, by another Sunday Times journalist, Paul Kimmage. However, the rumours about Savile 'liking little girls'

¹³⁸ Published as *LA Confidential* in France.

were merely hinted at by the journalist Lynn Barber in 1990 (see 2012), Simon Hattenstone (2000) and the filmmaker Louis Theroux in 2000 (When Louis Met... Jimmy, 2000). Orla Keirly, a journalist who did follow up on the exchange in the Theroux documentary – in which Savile admits he uses the 'I don't like children' line to dispel rumours that he is a paedophile – was reportedly 'taken aback to discover that more journalists had not put the question to [Savile] ... given the prominence of the rumours when he was alive' (Horan, 2012).

The media blind eye

'The good thing about investigating Armstrong was that there weren't many rivals trying to beat you to the story'.

(David Walsh, 2012)

Does libel fully explain the reluctance to cover the story, however? In the Savile case, how can one account for the glowing endorsements given by the press in place of hard-hitting allegations? Robertson has suggested that allegations about Jimmy Savile and the politician Cyril Smith 'could only surface after their deaths' because of libel law, but that does not explain the year-long gap between Savile's death and the eventual airing of the allegations in full, on ITV's Exposure programme in autumn 2012. The BBC has been heavily criticised for its decision to abandon a posthumous investigation by its Newsnight programme (which led to the Pollard Review, discussed below). In an interview with Press Gazette, Walsh described how there was no hope for coverage of the Armstrong doping allegations following the Sunday Times litigation in 2004. He singled out the BBC as 'particularly poor'.

Walsh described how fear of losing access to sources influenced fellow cycling journalists' reluctance to pursue the story:

...he recalls a story from 2004, when he was meant to travel with American, British and Australian journalists who he knew well. He was told they didn't want him in the car because

they thought it might anger Team Armstrong – and because ‘we need his quotes, we need his favour’. ‘To me that was an act of cynicism, and in a way I was the romantic who believed you could get to the truth,’ he says. (Pugh, 2012)

This, as with the Savile case, points to extra-legal and social reasons for avoiding the allegations, although risk of losing access to the source could not explain media reluctance to pursue the Savile story after his death. As the Guardian journalist Michael White describes, ‘the tabs routinely spike stories on grounds of taste and judgment as well as legal concerns’ (White, 2012). Presumably he means moral judgment, as well as legal judgment. Beyond this, there is a question of audience. Walsh describes how an American photo-journalist, James Startt, helped put him in touch with a source, after sensing ‘there wasn’t an appetite in his own country for the story’ (2012).

What were the most plausible explanations for the Savile silence? As noted above, libel does not explain why the allegations were not pursued after he died, or the reasons for Fleet Street’s lack of interest in the story. BBC Panorama journalist Shelley Jofre suggests that ‘a lot of the newspapers have questions to answer about that [long period of non-reporting] because everybody claims to have known’ (Turvill, 2013b). Roy Greenslade sets out the puzzle succinctly: ‘The BBC’s current problem [in explaining its abandonment of the story] is that it appears to have shelved the screening of a Newsnight investigation when it did have very firm evidence and, given that Savile was dead, it could not have resulted in a libel action’ (Greenslade, 2012).

This problem is at the heart of the Pollard Review dealing with the BBC’s non-coverage of Jimmy Savile allegations, although the investigator Nick Pollard argues ‘the most worrying aspect of the Jimmy Savile story for the BBC was not the decision to drop the story itself. It was the complete inability to deal with the events that followed’ (Pollard, 2012, para.4, p.22). His report shows evidence of conflicting views about the reasons for the abandonment of the programme. In emails to a friend, Newsnight journalist Liz McKean suggested that conflicting tribute programming explained her editor Peter Rippon’s reluctance to run the investigation (Pollard, 2012, para.142, p.86):

My story with Meirion is terrifying the bosses. Basically, BBC1 is preparing a Jim'll Fix It special for Xmas. ... Having commissioned the story, Peter Rippon [then Newsnight editor] keeps saying he's lukewarm about it and is trying to kill it by making impossible editorial demands. When we rebut his points, he resorts to saying: well, it was forty years ago... the girls were teenagers, not too young... they weren't the worst kind of sexual offences etc. ... Peter doesn't like to openly pull the story he commissioned, so he's hovering around looking tense.

Rippon firmly denied her accounts (Pollard, 2012, para.144, p.86):

[the account in the e-mail] is outrageous. I can't recall this conversation and I'm trying to put the story on air. I think what Liz may misunderstand is that...in the same way that I write an e-mail to Stephen Mitchell presenting the strength of the story in order to provoke a conversation with him, with them I challenged the story, in order to provoke a conversation with them. You know, ultimately I absorb both views and then I make a judgment...that particular allegation about 'teenagers, not too young'... I was pursuing the story. So it is illogical that I would have...said that... as I say, I can't recall that conversation, so it is quite difficult for me to...rebut it if I can't recall the detail of it.

Pollard acknowledges the conflicting versions and suggests that Rippon was trying to pass an editorial threshold, although he 'did make at least some of the comments (or, at least, comments similar to them) that Ms MacKean reports in her e-mails to friends' (Pollard, 2012, para.147–148, p 87). For McKean's colleague Meirion Jones, there was little 'journalistic' logic for Rippon's decision and 'that it could only have been motivated by pressure caused by the Christmas tribute programmes' (Pollard, 2012, para.168, p.91). Pollard found no evidence of this and did not agree; in his final findings, he states that no 'inappropriate managerial pressure or consideration' influenced the decision of Mr Rippon not to run the Savile story (Pollard, 2012, para.11, p.95):

While there clearly were discussions about the Savile story between Mr Rippon and his managers, Mr Mitchell and Ms Boaden, I do not believe either of them exerted undue pressure on him. Mr Rippon has told us that the decision to drop the Savile story was his, and his alone. I accept that the final decision was his. However, his decision was clearly influenced by his two managers.

Rippon himself admitted he may have been guilty of 'self-censorship' (Pollard, 2012, para.45, p.31) but clearly disagrees with McKean as to why. Whether or not Pollard's inquiry came to the right conclusion in dismissing the concerns of McKean and Jones

and the part that tribute programming played in killing the story, the report highlights the multitude of competing factors influencing a single editorial decision to shelve a programme. Detailed examination of available evidence produces various and conflicting accounts from the parties involved; this coupled with a lack of evidence, makes it incredibly difficult to identify the reasons for an 'editorial' or 'journalistic' decision to avoid a particular topic.¹³⁹

As discussed in Chapter Three, editorial decisions are subject to a complex web of competing factors, of which libel is just one. The solid evidence of Savile and Armstrong's threats and pursuit of libel action suggests that libel played a significant role in deterring both investigation and publication of allegations but the collective unreporting of the story was subject to a number of other influences as well including the high social status of both individuals, which, ironically, the media had helped create through sycophantic and unchallenging coverage.

The lone reporter

The final comparison to draw between the Savile and Armstrong cases is the role of the lone reporter (Tumber, 2013). While there were several journalists working on these stories, it is the dogged work of a select few individuals that eventually brought the full details to light. Walsh is the obvious candidate in the Armstrong doping case. In Savile, Liz McKean, Meirion Jones and Mark Williams Thomas, a former police detective and specialist in child abuse, all investigated allegations, with the latter decamping to ITV when it became obvious the BBC was not going to broadcast the story on *Newsnight* (see Keogh, 2013). It was Miles Goslett, however, who pursued the story of the BBC's abandonment of the investigation, and whose report in the magazine *The Oldie* was the first substantial report of the editorial fallout.

¹³⁹ Pollard notes that in interviews, Jones 'drew a significant distinction between the story being dropped for "editorial reasons" and "journalistic reasons". The former simply meant that a decision had been taken by the editor. The latter suggested that there was some journalistic logic to the decision' (Pollard, 2012, para.168, p.91).

Goslett's experience provides the final conundrum of this case study. Upon discovering that the BBC had shelved the report, and free of libel concerns (Savile was dead) he tried to pitch the story to Fleet Street editors. He assumed the story would 'sail into any newspaper' (Goslett, 2012). Over two weeks he contacted six national news desks. None was interested. Among the reasons he was given: 'bad taste' so soon after his death; it would not be worth pursuing Savile if the police hadn't during his lifetime; that the story was 'best avoided' for the time being. What was the significance of the timing? Goslett introduces a new deterrence factor: the Leveson Inquiry and the risk of his recommending statutory regulation. According to Goslett, one senior executive 'admitted that because his editor was about to appear in front of Lord Leveson's [sic] inquiry into press ethics, then at its height, it would be unwise to run the piece'.

This does not feel a wholly satisfactory explanation, however. There was no social, regulatory or legal retribution for the Oldie and yet the national newspapers continued to ignore the story. This surprised Goslett, who told *Press Gazette*, that save a follow up piece by the *Telegraph*, the facts revealed by the Oldie still did not entice the rest of the British Press. 'What seemed utterly bizarre to me was that nobody really went digging after that,' he said (Turvill, 2013a). Then, in October 2012, when ITV made its dramatic expose, the story really exploded, dominating front pages for weeks on end. Leveson had not yet reported so why did Fleet Street suddenly wake up at this point? The newspapers may have felt protected by the evidence of the ITV documentary, but they showed far greater inclination to go after the story, devoting front pages and extensive inside and online coverage to the scandal. As Goslett remarked, television is 'hugely powerful' for bringing an issue to attention and bringing new sources forward (Turvill, 2013a):

...you read *The Oldie* and the *Telegraph* and nothing much happens. But then you put together a well-made documentary with women speaking on the record about their experiences and of course that is what encourages people to come forward and say, 'it happened to me as well'. People feel emboldened. They respond when they can see and hear other people talking about it. So I think this demonstrates the huge power of television.

Although Goslett appears convinced by the Leveson reason, he still seems a little bewildered by his difficulty pitching the story prior to the ITV documentary: 'I have suggested that Leveson might have had something to do with it – and I can't really imagine what else it could have been' (Turvill, 2013a).

Another difficulty with Goslett's explanation is that the newspaper *did* go after the type of stories that would be very likely to catch Leveson LJ's attention while the Inquiry was ongoing; for example, they printed aggressive stories about the actor Hugh Grant, who appeared as witness at the Inquiry,¹⁴⁰ and sent photographers to the house of the mother of his child in November 2012. Perhaps fear of Leveson's critical eye influenced some news desk editors' decisions regarding the Savile story, but I suggest two factors played a greater role: first, a tendency for herd-like behaviour dissuaded them to run the story when they knew another broadcaster had run shy (and if they had previously run with an angle focussing on the BBC's abandonment of the story rather than the actual allegations of abuse, it would be difficult to justify why they were also stepping around the edge of the story and had failed to report it in the past) and second, the social reverence given to Savile in their own national treasure tributes. In this regard, an adaptation of Michael White's explanation (2012) feels more credible during this time of regulatory unsettlement: stories were routinely spiked on grounds of taste and moral judgement as well as legal *and Leveson* concerns.

6.4. Conclusions

This chapter has examined the information that influences editorial and legal decision-making. It first looked at the raw legal data informing perceptions of legal risk, and

¹⁴⁰ In supplementary evidence given to the Leveson Inquiry by Hugh Grant, the actor described how on 10 November 2011 the mother of his child was 'still being followed and harassed', although he did not specify which titles the photographers were working for (this is also reported in Ting Lan Hong & KLM (*A Child*) v XYZ & Ors [2011]). Grant also complained that in the 'last nine days most of the tabloids have set their columnists on me'. The Daily Mail's Amanda Platell described him as being in 'tawdry, inexorable decline'. In Grant's view, the newspapers were making an example of him. 'The message seemed to be that anyone like me who had the effrontery to speak openly about phone hacking, intrusion, harassment and other tabloid abuse, or who agreed to be a witness at this Inquiry, could expect similar treatment' (Grant, 2011, para.21, p.6).

drew attention to a deficiency of reliable data available at source. More significant in forming journalists' decisions, it was suggested, are the pieces of information and speculation circulating internally in newsrooms, as well as through blogs and social media, and in media reports. As seen in the case study on super and anonymised privacy injunctions, there were a variety of factors influencing collective action to disobey injunctions protecting confidential or private information, including a dearth of reliable information about the true extent of so called super injunctions.

Similarly, a range of competing factors influenced the BBC's and other media decision to avoid allegations relating to Lance Armstrong's doping in the Tour de France races and, in an entirely separate but analytically comparable case, allegations of sexual abuse made against the late television presenter Jimmy Savile. It was suggested that both these cases had a number of characteristics that led to a mass media omertà, eventually broken by a few individual reporters. At a particular point, the evidence for the allegations and public interest in each case was so strong the story could no longer be ignored, despite the social power of both Savile and Armstrong.

Other cases may benefit from similar analytical treatment; the recent conviction of the children's entertainer Rolf Harris for 12 counts of indecent assault, shared some, if not all, the characteristics above, as seen in the Guardian's headline announcing the verdicts: 'National treasure ... paedophile'.¹⁴¹

While this chapter has attempted to avoid a 'simple lumping together of factors' (Benson, 2010a, p.219), the reasons for persistent non-reporting are not easy to identify or isolate and the cases highlight the complex interplay between legal and social factors in deterring journalistic investigation and publication. At a particular point, there is a

¹⁴¹ A version of the front page article on 1 July 2014 can be found online (Walker, 2014). A few days later Simon Hattenstone who has interviewed both Harris and Savile, as well as Max Clifford (recently convicted of a series of sexual assaults) reflected on why he missed the truth despite 'signs of inappropriate behaviour'; he notes that all three engaged in activities that 'sold themselves to us as protectors of children' (Hattenstone, 2014).

tipping point in the life of a set of facts, which transforms or activates them into national and global news, with legal and social inhibitions disregarded (see Anderson, 2010, p.290). How that transformation is effected remains a difficult point of analysis. This is explored further in the next chapter, which brings together the theoretical questions explored during the whole thesis.

7. Concluding discussion: The 'chill' on journalism in its social context

This thesis has thus far addressed a straightforward, even if practically problematic, empirical question: what are media lawyers' and journalists' interactions with defamation and privacy law? Interviews with lawyers, surveys among journalists and scrutiny of policy and media texts, have revealed a deeply complicated and contentious process of editorial legal decision making which is difficult to evidence systematically and conclusively. Nonetheless, the data presented here helps answer the normative question of this research: how should media legal interactions be interpreted and mediated in judicial, academic and policymaking fields? Beyond that, how do the findings inform the development of socially desirable and equitable legal and regulatory policy and processes? The conclusion to this thesis is split into two parts: this chapter weaves together the findings of the empirical chapters with the theoretical themes explored in Section II. Chapter Eight makes practical policy recommendations based on these conclusions, and suggests some ways in which future research could be enhanced and developed.

How to develop a theoretical understanding of the impact of libel and privacy? This chapter will suggest two ways. First, it is suggested that 'legal' editorial decisions are subject to competing influences from within and between specific professional and state fields, and that the activation of a set of facts into news (a conceptualisation borrowed from Anderson 2010, p.290), and the factors which influence this, are better understood in the context of a globalised and networked news ecosystem. Second, it is necessary to further unpack judicial and scholarly definitions of the chilling effect: analytical efforts should concentrate on the causes and perception of the chilling effect rather than its veracity.

7.1. Media law in contemporary media systems

Understanding influences

It is vital to consider the 'institutional context within which media is located', which may contain many elements, including law¹⁴² (Kenyon and Marjoribanks, 2008b, p.2). In so doing, this thesis has attempted to respond to Benson's call for greater attention to the 'mezzo-level' journalistic field, in the way it has set out both the macro-level legal and regulatory structures and micro-level interactions within organisations, and explored the relationship between organisations and actors, and, importantly, between professional fields.

Developing Bourdieu's post-structuralist approach, Benson attempted such an exercise in relation to the correlation between media coverage and law and regulation in France and the US. He hypothesised that a higher level of state intervention in media regulation in France than in the US would lead to the publication of less critical content. However, he found that coverage of government and powerful political actors 'was not less frequent nor intense in the more state-dominated French media as hypothesized', as compared to the US¹⁴³ (2001, p.40, also see 2010b, p.13). Contrary to his initial hypothesis, the French coverage contained a 'surprisingly high level of critical content', despite state intervention in the form of law, regulation and funding. He concludes that the centralised and 'economically competitive' nature of the French journalistic field may help explain its 'greater dramatization of political debate' despite the higher level of state intervention (2001, p.48). Therefore not only should we consider the separate state and commercial constraints in analyses of coverage, but also the context of the 'mezzo-level organizational field' (2001, p.49), which mediates external commercial and state pressures, and 'thus provides for a more complete explanation of cross-national differences and similarities in public spheres' (2001, p.5).

¹⁴² They draw on Benson and Neveu (2005), and Cottle (2003).

¹⁴³ Benson's study looked at journalistic coverage of 'structurally comparable' political events in France and the US (2001, p.15).

The research data analysed in this thesis reflects Benson's argument that publications within a national field 'are arguably affected to a similar degree by both political field influences (state regulations, reporter relations with their information sources, etc.) and by the internal logic of the journalistic field as expressed in the dominant formats of organising and presenting the news' (2009, p.413). The Savile and Armstrong case studies included in this thesis showed how the dual influences of the political field (the structure of statutory libel law, for example) and the internal logic of the field are evident in editorial and legal decision making (journalists preserving access to their sources, for example).

The challenge is to find a way to separate these influences in order to assess their impact on media discourse. It may be a fruitless exercise. As Benson suggests,

Given the complexity and multiplicity of factors involved, it is certainly fair to say that news discourses are over-determined. In other words, since multiple factors often push the media in the same direction (e.g., both state and commercial factors potentially contributing to ideological narrowing), it simply may not be possible to identify the one or two most important factors. (Benson, 2010a, p.618)

However, while accepting that 'forces shaping news production are often intertwined and inter-related', Benson believes that a 'simple lumping together of factors' would limit insight into cross-national variations. He suggests that comparative research, at the very least, can 'punch holes' in existing assumptions (2010a, p.219) and has suggested that countries selected for certain constant variables (level of advertising or ownership concentration, for example) could 'test more effectively for others (such as the effects of libel or other government policies)' (2010a, p.621).

To understand these influences better, Benson's approach needs to be extended. As this thesis has attempted, there needs to be scrutiny of the relationship between specific laws and coverage, and further differentiation between specific statutory provisions, case precedent and policies *within* the category of law and regulation. The findings of

this thesis, in one jurisdiction alone, indicate that careful attention must be paid to the specificities of the laws and policies, and other variables, to make the conclusions useful, and the comparisons valid. It is no easy task to 'fully delineat[e] the causal mechanisms at work in facilitating or inhibiting press criticism of government and other organized political actors' and as Benson suggests, requires further research for additional variation across a number of factors (2010b, p.18).

Cross-field effects

How to further explain the overlap between journalistic, political and legal fields? They can be understood as 'cross-field effects', as explored by Lingard et al. in relation to education policy (2005, 2004), and the 'links between a given field and that subset of state and non state fields on which it routinely depends' (Fligstein and McAdam, 2012, p.204). Lingard and Rawolle set out the 'effects of interactions between the fields of journalism and the policy fields' and the 'interplay of the logics of the media and policy fields' (2004, p.369) in which logics of practice of the journalistic field can reconstitute education policy and other policy fields (2004, p.377). For Fligstein and McAdam, one cannot understand stability and change in a field, without looking at external events and processes (2012, pp.203–204). In the same way, there are cross-effects and interdependencies between legal, political and journalistic fields (see Champagne, 1990, 2005; Couldry, 2003a; b, 2013; Fligstein and McAdam, 2012, p.203).

This helps explain a range of interactions that lead to the publication, or non-publication of material: these are media-legal interactions that take place in overlapping domains – or fields – of journalism, politics and law, which leads to the development of specific media-legal practices. The relationship between the printed press, radio and television and politics is *so* closely linked, it is perhaps more accurate to talk about a 'journalistic-political' field, suggests Champagne (1990, p.261). He does *not* go so far, however, in his emphasis of the increasing level of interdependency between the two fields (see Champagne, 1990, p.250, p.261). Such a fusing of two fields would be problematic; as Couldry notes (perhaps overplaying Champagne's suggestion), using

hybrids to explain that non-media fields and their relation to media 'would no longer serve to differentiate the dynamics of particular fields' (2013, p.18, also see 2003a, p.9, b, pp.661–662). Following this argument, I have chosen not to delineate a specific 'journalistic-legal' field as such, but suggest that a recognition of 'cross-field effects' or what Couldry describes as 'transversal effects',¹⁴⁴ allows examination of legal, political and journalistic structures, interactions between individuals and organisations, and the resulting media discourse – or non-discourse – relating to particular information and events.

This view accounts for the way in which a particular legal case 'roils the waters in a host of fields affected by the ruling' (Fligstein and McAdam, 2012, p.203), as was demonstrated in the super injunction mass disobedience affecting journalistic and political and legal fields. It explains irrational outcomes that disobey norms of the field (for example, behaviour that appears to contradict legal common sense, such as the non-coverage of Savile despite his death and the way some hyperlocals were worried about potential legal action by councils despite the Derbyshire rule) and confusing patterns in media law policymaking (Curran and Seaton describe how the Labour Party was, at the time they were writing, divided 'between those who want to curb the excesses of tabloid journalism through new legal controls, and those who want to liberalize media law (with some quixotically wanting to do both)' (1991, pp.370-371). Such contradictions can be explored within the crossover between journalistic, political and legal fields, where unpredictable decisions are made, subject to a complex web of competing influences and where individuals do not always act in a straightforwardly self-interested manner (Fligstein and McAdam, 2012, p.218).

¹⁴⁴ As part of a wider theory of 'mediatization', which sees media 'as an irreducible extra dimension of all social processes' (Couldry 2014, p.58).

Global context

These cross-field interactions are situated in a wider media policy landscape, at a national and global level (see Braman, 2004) and contain the newsroom or site of production (if, indeed, the originator of the material is based in such an environment), public and private digital platforms, and sources of legal information (statute, case law and legal education resources). It is beyond the scope of this thesis to consider the case for demarcating a field of media policy,¹⁴⁵ or media legal policy, in a Bourdieuan sense, with its own logic of practice and *habitus*, but that is certainly something that could be explored in further comparative study.

To further understand the dynamics within and between political, journalistic and legal fields, it is vital to consider the 'global character of relations', as Lingard, Rawolle and Taylor have argued in the context of education policy (2005, p.761). However, despite the obvious global nature of many of the examples discussed in this thesis (journalists' use of global technology platforms, the contravention of English injunctions in other jurisdictions, the development of European-level media law), the national context was still key. London-based media lawyers and online and print journalists are still mainly preoccupied by litigation and legal frameworks in England and Wales despite working for publications operating in a global publishing environment. In recognising a new global space created by digital technology, national specificities must not be forgotten.

Lingard, Rawolle and Taylor allow for this: while acknowledging the global, 'educational policy also remain[s] national and very localized, with the *habitus* of actors situated in various positions within the field, also reflecting and affecting differing local, national and global dispositions' (2005, p.774). This formulation applies, in part, to media legal and regulatory policy; clearly, the growing global character of media and legal policy is

¹⁴⁵ Braman has identified many of the problems associated with defining a field of media policy, distinct from the information policy field and suggests that a multi-faceted approach is needed (2004, p.182). Her use of field is loose, however, and not necessarily in accordance with Bourdieu's use of the term.

important, but there is evidence that national developments within a single jurisdiction are still socially pertinent for media lawyers, journalists and their audiences.

The empirical data presented in this thesis, based on interviews, surveys and analysis of case studies, exposes the disruptive effect that the internet has had on media-legal interactions within the 'networked information economy' with important ramifications for law and regulation (Benkler, 2006; discussed in Barendt, 2014; also see Braman, 2004). Digital technology is both liberating (by enabling individuals greater access to publishing and communication tools) but also constraining (it allows participation but does not offer the legal resources typically enjoyed by larger publishers, nor special protection from communication laws). These interactions between global technologies and national laws are better seen as causing friction: 'heterogeneous and unequal encounters [that] lead to new arrangements of culture and power' (Tsing, 2005, p.4). How to further conceptualise this globalised, decentralised digital environment in which editorial decisions are made, with its markedly 'national' character in relation to law and regulation?

Editorial decisions in the news ecosystem

In a further departure from the post-structuralist theory advanced by Bourdieu, this thesis contends that an ecosystemic approach, which emphasises the continually shifting relationships between actors, organisations and news objects, as advanced by Anderson (2013a; b, 2010), would be helpful for contextualising research on defamation and privacy-related law and regulation and journalistic practice. It is beyond the scope of this thesis to generalise the characteristics within the ecosystem that lead to 'activation' of a piece of information into news (2010, p.290). It does not, as Benson and Saguy have attempted, fully test hypotheses about the relationship between structural features and news output (although they too are tentative in their results about the connection between libel and privacy laws and news discourse; see 2005, p.255). It is not its mission to fully explain the forces at play with a fully developed social theory. It does attempt, however, to situate assumptions about the dissemination

of information and journalistic legal processes within a more appropriate conceptual framework. To this end, it would be helpful to think about the legal influences that shape editorial decisions within a news ecosystem.

The notion of an ecosystem, with its emphasis on the 'assemblage' of networks over 'obdurate macro-structures' (Anderson, 2013, p.173; Wahl-Jorgensen, 2014, p.1125), by no means fully explains the self-limitation and censorship that takes place in journalistic decision making, but it provides a conceptual vehicle in which to situate editorial decisions relating to law and regulation, which provides context and appropriate acknowledgment of the shifting influences and subjectivities that shape the chilling effect doctrine. It should be stressed that while semantically connected to the study of physical ecology, the ecosystem metaphor only goes so far: this is not an attempt to describe something entirely analogous to a physical ecosystem; and it does not attempt to situate this conceptual network within a physical environment (cf. Maxwell and Miller, 2012).

The notion of the 'news ecosystem', introduced in Chapter Three, can easily be critiqued for its fluidity and lack of substance; in a sense that is precisely what makes it appropriate as a conceptual framework for this thesis. Its fluidity allows the exploration of specific interactions outside the newsroom. Such a model allows for the fact that an editorial decision to publish – in Anderson's terms, the activation of a fact – is influenced by a range of factors and actors. It allows examination of the diffusion of 'a particular set of news facts' and discusses the various elements that may have influenced a particular pattern of dissemination.

The networked news ecosystem acknowledges the 'networks, organizations, social groupings and institutions' that influence a decision to publish from within the newsroom (Anderson, 2013a, p.4) and the interactions between different types of media producers and consumers (see Jenkins, 2006). One of the in-house lawyers

interviewed (YI) described how different types of media organisations work in a relay: 'Often what happens is that the tabloids will bring out the more salacious stuff and the broadsheets will follow through with the more public interest journalism'. This interaction can be seen within the context of the news ecosystem. Within this environment, specific *legal news values* and *legal news formats* develop, as well as *legal gatekeeping practices*. Inter-jurisdictional laws are just one of the many influences on information flow within news ecosystems. This framework is useful because it allows for a certain definitional fluidity; decisions within the news ecosystem can have a legal bearing but may not be categorised as 'legal' by those who make them.

Anderson, Bell and Shirky (2012) provide an example of the way legal influences affect information flow in the networked news ecosystem. They set out how the 20th century syndication model based on copyright enforcement (the Associated Press's, for example) was disrupted as a result of dramatic change in the 'basic configuration of the media landscape': the development of low cost methods for digital reproduction and the arrival of new actors (for example, the Huffington Post).

In the old model, reuse of material was either contractual (freelancers, wire services) or hidden. In the new model (old models, really), there are many forms of reuse; some are contractual, but most are not. The AP is a particularly visible case, but every news institution is going to have to position or reposition itself relative to new externalities in the ecosystem. (Anderson, Bell and Shirky, 2012, p.91)

Anderson, Bell and Shirky use this disruption as an illustration of a shift in flows within the 'new news ecosystem', but there is also something more specific and pertinent to the theme of this thesis to be drawn out from the example above. Not only does news practice change as a result of new technology, so does practice around law, with the potential for change in the substantive and procedural law itself. The interaction is two-way: legal influences shape news production, but news practice also affects the development of law. For example, the mass disobedience around super injunctions, enabled by internet platforms, has prompted tightened procedure and greater

transparency about the granting of privacy injunction applications, and also the legal activity of potential claimants.

The news ecosystem allows lines to be drawn between different actors and organisations; in other words, the focus shifts to different types of inputs and outputs that affect the activation of 'news'. What are the journalistic, legal and regulatory actors and assets affecting the journey of a piece of information? Crucially, the networked news ecosystem pays attention to a variety of factors and influences that are not limited to one professional field; it helps, as suggested above, to 'mediate[s] external commercial and state pressures' (Benson, 2001, p.5) and the internal logic of the journalistic field. The next section sets out some of the characteristics of media-legal interactions within the networked news ecosystem.

Media-legal interactions in a digital environment

Group behaviour or the pack effect

The flows within the system are undoubtedly affected by legal factors, including indirect or direct fears of libel or privacy litigation. A direct threat from a potential claimant may have a particularly censorial effect in specific circumstances, but it is suggested here that the effect of an indirect threat is much more sensitive to the movement of the pack. Drawing on the empirical evidence presented in Chapters Four to Six, this thesis proposes that the movement of the pack can override expected legal or regulatory considerations. This effect could lead to *collective suppression* of information despite a lack of legal restriction (in the Jimmy Savile case, for example, once the potential claimant had died), or *collective publication* of information despite a likely legal risk (in relation to super injunctions, for example).

In recent years social media have come to play an important part in directing and swelling the tide of news. This phenomenon can be observed in the publication and suppression activity of journalists but is not always overtly articulated by journalists or

members of the legal profession. This may be because a herd mentality is not considered a desirable journalistic characteristic although it is arguably part of the profession's *doxa*. The case studies set out in Chapter Six strongly suggest that informal collective legal belief guides media organisations and individual journalists, however. This can give individuals confidence to publish, even if that decision is made in a matter of seconds. In the Trafigura case described in Chapter Six journalists felt able to disobey the injunction referred to by the Guardian, buoyed by the Hansard evidence and the possibility of protection by parliamentary privilege, and the actions of several high profile bloggers. No subsequent legal action over these potential breaches has been reported.

In the McAlpine case, tweeters – including journalists – also pushed legal boundaries but this time legal action ensued. Following a BBC/Bureau of Investigative Journalism report on BBC Newsnight, tweeters, including several high profile figures, alluded to Lord McAlpine and his (wrongly) rumoured connection to allegations of sexual abuse, despite the mainstream media's decision not to publish the identity of the specific individual (see Dowell, 2013). In this instance, these individual users and journalists were unwise to do so because the rumour was wrong and legal action was threatened and officially pursued in court in the case of prolific tweeter and media figure Sally Bercow (it was eventually settled following a preliminary ruling in McAlpine's favour, see Dutta, 2013). Had a bigger organisation reported, rather than disguised, the name at an earlier stage, it would have been interesting to see whether a tipping point similar to that in the Trafigura case would have been reached, and if so, the implications for the shape of the subsequent legal action. As well as illustrating the significance of collective legal awareness, it demonstrated the interconnected nature of publication and legal decisions: the BBC chose to withhold the name, but external publishers pieced together the (mistaken) evidence and added detail to the allegation.

A collective sense of newsworthiness is also part of this pack effect. The reputations of the figures of Savile and Armstrong were untouchable until there was such a media buzz around the under-reported allegations and facts that they become mainstream news, suddenly deemed newsworthy. The point at which information becomes widely publicised and transformed into news, the tipping point in the story's life, is difficult to explain. One explanation, while at odds with typical journalistic ideals and not directly reported in responses to my surveys, might be that organisations and especially small organisations feel braver to expose and discuss controversial facts when in the company of others. Or it could be that the perception of likely audience interest changes once another publication has taken the plunge with a previously untouchable story.

Linked to this, there is also evidence of a reluctance to use confrontational formats. A study by Williams et al. indicated that hyperlocals did not frequently report stories with opposing viewpoints. The authors do not find it a convincing enough argument that the hyperlocals have simply rejected mainstream news formats, but are unable to fully explain this reporting pattern (2013, pp.7–8). My own survey data suggest that the fact that hyperlocals are reporting on under-covered areas or 'communities', in close geographic proximity to their sources and readers, with no organisational buffer and scarce legal resources, might dissuade them from taking a more confrontational approach or publish controversial information. A number of respondents talked about their concern about damaging relations with neighbours and other members of the local community. There is scope, however, to interrogate this suggestion more thoroughly and directly, as it was an incidental finding of the surveys.

In summary, this section on the *pack effect* has suggested that while isolated legal factors play a significant role in shaping news decisions and lawyers play an influential role in gatekeeping decisions, group or pack behaviour plays an parallel role, and may override the decision that would be taken by a lone individual person or organisation. This factor gives individuals or organisations confidence – sometimes misplaced – to

disobey or ignore a legal warning. It is a natural extension to suggest that an undesirable chilling effect (as one perceives it) may also arise as a result of group behaviour alongside a distinct and direct legal factor, such as an injunction, the threat of an injunction, or an anticipated injunction. The material presented in the Chapter Six case studies demonstrates that unofficial conglomerates of media voices can promote or suppress particular facts; these can also deter – or chill – desirable free expression. The contention here is that the shape and characteristics of group behaviour, albeit based on other underlying factors, should be paid particular attention when analysing the reasons that material is not published, or investigated in full.

Recognition of this factor leads to the following observations: that media organisations and individuals are strongly influenced by the publishing behaviour of others despite the widely-recognised implicit journalistic values of exclusivity and originality; that media organisations can act against, as well as for, free expression by collectively suppressing particular information, or promoting information that deters the free expression of others; that a 'safety in numbers' belief (even if misguided) plays an important role in media-legal editorial decision making. Collective group action takes place within the networked news ecosystem; the way that information travels is also conditional on the nature of communication technology (i.e. social media channels have allowed a faster and wider communication of hearsay or rumour).

The changing role of the media and media lawyers online

This phenomenon gives rise to another question: how are the pack and the wider media informed about media-legal developments? In part, lawyers' and journalists' actions and knowledge are informed by what they read in the media, however critically they treat this information. There are two factors that need to be considered.

First, the media are, as discussed in Chapter Three, holding up a 'magic mirror' to events based not just on journalists' beliefs but the 'conscious and subconscious interpretation of readers' preferences' (Chalaby, 1998, p.189). However, this does not explain the

angles chosen and newsworthiness assessments for topics where the media have particular interests as regards their own freedom and survival. There have been some marked trends in agenda-driven and restricted media self-reporting during the period of study, which expose the nature and implications of pack-style newsgathering and dissemination in relation to freedom of expression and the public's right to receive information. This was particularly noticeable in reporting during the earlier stages of the phone hacking scandal, following Nick Davies' revelations in 2009 and later, during the Leveson Inquiry itself, with obvious omissions from coverage and neglect of particular angles of inquiry and opinions (Bennett and Townend, 2012; Townend, 2013b). It is especially important to recognise the influence of media self-interest when understanding the flow of information about media law and policy, in which media institutions have a particular stake.

Second, the 'press' still plays a crucial role in disseminating media-legal knowledge, despite the growth and proliferation of social media networks and independent media sites and organisations. The 'press' – treated as a metonym for national print-based media – wields particular political clout in the UK, as discussed in the opening chapter of this thesis. These titles, which have associations with printed newspapers, have continued to play a leading role in determining the flow of information in the news ecosystem. They carry particular weight. To reiterate, nationally recognised scandals and storms, in which there has been significant and widespread political reaction to publicly reported and controversial information, have required promotion by major print titles, even if they have been triggered and initially promoted by smaller or other types of media players. The key agenda influencers may – and probably will – change over time (although they are likely to be large corporations, rather than small operations or individuals). This could be technology companies which primarily provide news infrastructure but also influence the content of news (for example, Twitter, Facebook and Google) or specifically editorially-focused publications and platforms, akin to online-only titles such as VICE, BuzzFeed and Huffington Post.

Furthermore, media sociologists' measures of national reaction and scandal will probably pay less attention to how developments are reported in newspapers; a methodological shift which has already begun (see, for example, Anderson, 2013b).

With this shift of influence, the nature of media-legal events and collective decisions are likely to change. If more varied sources hold more clout, the press is likely to hold less significance in the understanding of the flow of legal information among publishers and journalists. Chapter Six showed the very particular role of the British press in shaping the outrage over super injunctions and in opening up the discussion and reporting of allegations on Jimmy Savile and Lance Armstrong. A comparable analysis in ten years' time, on a major media-legal event in which there is collective publication or suppression of information, might look very different with different types of media and communication influencing the shape of legal editorial decisions and the movement of the pack.

It is clear that new non-press players already influence, if not entirely shape, these events. Media-legal information is already travelling in different ways online, with the participation of lawyers and legal experts on Twitter. Some lawyers and legal commentators offer disclaimers on their Twitter and blog biographical information: that the general information provided is not legal advice.¹⁴⁶ Despite this clear demarcation of non-legal advice, the information inevitably has an effect on what people publish and how they behave. It may also direct them to a particular lawyer who they may choose to engage in a professional capacity.

Furthermore, claimants and defendants are now sharing their experiences online, before or after the event, in a variety of ways: examples include the Sunday Times

¹⁴⁶ See, for example, the Panopticon Blog on Information Law, which states: 'This blog is maintained for information purposes only. It is not intended to be a source of legal advice and must not be relied upon as such'.

journalist Alan English tweeting a picture of the original claim form in the Armstrong libel suit (2013); a blogger reflecting on the experience of defending a claim (Reed, 2012); a lawyer announcing on Twitter that they had just achieved a 'fantastic six figure settlement' for their client (Bains, 2013). This information and interpretation of events also feeds into media coverage, as well as public understanding of media law.

Lawyers as gatekeepers

Chapter Four argued that lawyers play an important and influential role in the social process of editorial gatekeeping even if lawyers maintain that they play a strictly 'advisory' role within their professional guidelines. These practices are influenced by journalists' cultural norms and behaviour; likewise, journalists' behaviour is influenced by the legal advice and training they receive. Lawyers may take on a variety of roles at all stages of the pre and post publication process (for example, drafting corrections or suggesting amendments to copy). While there are certain similarities between procedures at different newsrooms, it is clear that there is great variety in the way that publications deal with complaints, which may depend on contingent factors such as interpersonal relations, the experience and knowledge of employees.

Lawyers play an important enabling as well as inhibiting role, with many describing how their job is to get as much as possible published, and to guide journalists at a newsgathering stage on legally contentious stories. While they are usually advising one particular client, their advice has further reaching consequences: several institutions may join together to fund a particular legal defence or challenge, or an internal decision at one organisation may affect the decision made at another. Further still, the legal activity of institutions has a direct bearing on the shape of the law: without their participation in legal actions (as willing or unwilling participants), the case law would not be developed. While not always economically prudent for media organisations to participate in litigation, judicial determination on important issues can help lawyers make better decisions at an earlier stage.

The journalist-lawyer relationship is key to understanding news flow within a national press or broadcasting news environment. This is clearly important when thinking about the inhibitions or restrictions faced by players in a digital or smaller news environment. While potentially freed of commercial pressures and expectations, or blissfully unaware of legal risks, the absence of a lawyer could be detrimental to these publications' legitimate freedom of expression and writers and journalists may unwittingly restrict themselves further than necessary. As a separate but related social issue, a lack of institutional support and workplace camaraderie could make them less inclined to pursue socially controversial stories which could negatively affect their dealings with institutions and individuals in the community.

A two-way interaction between law and journalism

As demonstrated in the AP/copyright example (Anderson, Bell and Shirky, 2012, p.91), changing communication patterns alter the nature of legal practice and frameworks. This is an important point which is often overlooked in studies of media law (see Chapters Two and Three), which concentrate on the impact of law on journalism, or make normative assessments of case law, which misses interaction outside formal courts procedure. In fact, the way in which journalists behave is instrumental in shaping legal responses and attitudes.

One neat example of this is the developing approach to a right of reply and going to the other side for comment, as noted in Chapter Four. In-house lawyer (YJ) was interested in the question of timing a right of reply request, in line with the requirements of the Reynolds defence for responsible journalism, now replaced by a more general public interest in the Defamation Act 2013. In their view, the speed of digital technology changed the notion of 'perishable' content and a reasonable amount of time to allow someone to reply to an allegation. Journalist Patrick Smith also observed this in 2010,¹⁴⁷

¹⁴⁷ Smith formerly reported for UK trade journal Press Gazette and the media industry sites paidContent:UK and MediaBriefing, and now works for BuzzFeed. He participated in an earlier research project for my MA dissertation (findings reported in Townend, 2011a).

when he described the problem of waiting for a response from another party when there is no print deadline:

I can't say that the medium I'm writing for has ever altered my approach to reporting. One thing it does change is the 'reasonable' amount of time you should give someone to respond (in order to be fair and balanced, perhaps to qualify for a Reynolds defence). With an industrial journalism process that involved printers and vans, this is easy: 'Comment by 5pm or you don't get a say'. But how does an entirely online business like paidContent:UK manage this problem? One hour? Two hours? This is an evolving area, but I can safely say it's never affected the make-up of my stories. (Quoted in Townend, 2011a)

As technology alters the pace of publication, the manner in which journalists 'Reynoldize' their stories (Weaver et al., 2004, p.1295) or 'airtight' them (as YJ put it) will also continue to change, and an approach informed by Reynolds and Jameel will be adapted under the new public interest defence, which replaces the Reynolds defence.

These evolving norms of practice inevitably shape judicial decisions (what constitutes responsible journalistic practice, for example) but also informal interactions at a pre-court stage – the advice a claimant lawyer might give his or her client, for example. In the context of contempt of court, procedural guidance has changed to allow journalists to bring mobile devices into court to tweet and live-blog from the courtroom, or an annex outside; this was forced, to some extent, by journalists' expectation that they should be able to tweet, with some just getting on and doing it (Ben Kendall, a local news reporter in Norfolk is perhaps the first known UK example,¹⁴⁸ although national reporters requesting permission to tweet during Julian Assange's hearing at Westminster Magistrates' Court brought the issue to the fore in December 2010). These substantive or procedural changes are not without their contradictions: at most courts, cameras and dictaphones are confiscated at the door, while mobile phones with camera and recording features are allowed to be taken into the court room as long as they are turned off (for members of the public; journalists are advised to keep them on silent if they are using them to tweet or blog).

¹⁴⁸ Kendall live tweeted a murder trial at Norwich Crown Court in August 2010 although he said he 'very much doubt[s] nobody has done it before me' (2010).

Legal decisions or rulings also impact on journalistic practice in informal ways. The legitimacy of a particular approach may not have been properly tested in court, yet perception of the law affects journalists and bloggers' behaviour. One example of this might be the way that many bloggers and newsrooms in England and Wales handle their online comments: post-moderation, as opposed to pre-moderation of comments, a practice based on the belief that 'it is easier to avoid liability for anything that is defamatory, infringing or otherwise unlawful' through post-moderation (Out-Law.com, 2008). However it is still a fairly unexplored area of law and in 2013 the ECtHR upheld the Estonian Supreme Court's decision that a news site was liable for defamatory comments posted by readers, despite the fact it had taken them down following complaint (*Delfi v Estonia* no. 64569/09 [2013]). It also throws issues of defamation up against issues of contempt; pre-moderation might provide better protection against contempt of court, although this is also yet to be tested.

Jurisdictional and temporal fluidity

The final media-legal feature of the globalised news ecosystem is its jurisdictional and temporal fluidity and uncertainty. In a pre-digital era, claims were restricted by the means of dissemination. Famously, in 1848 the Duke of Brunswick sent his servant to the British Museum to obtain an archived copy of a newspaper published 17 years before, so he could sue for libel (the court considered it a new publication, even though it was outside the limitation period for libel actions, which was six years at that time).¹⁴⁹ This was an anomalous scenario. Generally, if action was not taken soon after publication, the risk of a claim was minimal: a newspaper was archived in a library with a small chance of being read again, and certainly not by a wide audience, and it was likely that action would be limited to the jurisdiction within which the contentious item was published. As this thesis has shown, this has changed radically with the development of digital communication.

¹⁴⁹ For more details see Brett, 2011.

One of the main complaints of the Libel Reform campaign was 'libel tourism' and forum shopping, allowing rich claimants with little connection to the jurisdiction to use the English courts because of its claimant-friendly defamation law (Glanville and Heawood, 2009, p.9). While the courts have taken an increasingly stern approach to such claims in recent years (see, for example, *Karpov v Browder & Ors* [2013]), Section 9 of the new Act is supposed to further counter this phenomenon (although, as discussed in Chapter Six, a lack of data on courts and settlement activity will make it difficult to assess its efficacy). Another key reform was the introduction of the single publication rule in Section 8 to replace the approach taken in the *Duke of Brunswick* case. No longer would a fresh download or accessing of material be considered a fresh online publication, creating what is in effect an unlimited period within which to make a claim. While a claim could still be brought over material that is substantially changed online, libel actions over material available online will be limited to material published within 12 months of the original publication – as they would in print (this approach to publication is at odds with the approach considered in relation to contempt of court; government proposals, recently abandoned, contained an obligation for publishers to remove old material if it might risk prejudice to an active case; see Bakshi, 2014).

Despite the reforms introduced in the Defamation Act 2013, which make the potential jurisdiction and time frame for defamation claims a little more predictable, the environment is still very uncertain. As observed in Chapter Four, UK-based publications are still open to libel and privacy claims in other countries, especially when they create new publishing bases for their publications. While English law still holds particular concern for many publishers (see, for example, Spanier, 2011), claims can easily arise in other countries as was starkly described by the Guardian's in-house lawyer, Gillian Phillips (Waller-Davies, 2014). In the context of European law, a claimant's 'centre of interests' may be more pertinent than the place of publication in assessing the legitimate jurisdiction for a claim to be brought (*eDate Advertising v X* (Area of Freedom, Security and Justice) [2011]).

Legal characteristics of the networked news ecosystem

This section has described a potential conceptual vehicle for understanding editorial legal decision making in a digital and networked news environment. The notion of the 'ecosystem' may go out of scholarly fashion and be replaced by another term in due course. In the meantime, this idea, even if not a fully developed theory in its own right, seems the most appropriate description for the complex and interconnected legal and journalistic interactions described in this thesis. With better data, it would be possible to develop the analysis of its legal and social characteristics and make firmer suggestions about the general conditions influencing the dissemination or 'activation' of information in the modern media environment in relation to law and regulation.

7.2. Reorienting the chill

With these particular media-legal features of the networked news ecosystem in mind, it is time to re-visit the chilling effect doctrine. As suggested in Chapter Two, the chilling effect doctrine is used in judicial and media discourse to describe suppression or inhibition of expression. Chapters Four and Five provided a variety of accounts and definitions of the chilling effect through journalists' and lawyers' first-hand descriptions and definitions. How then does this empirical data on media-legal interactions in the digital environment, and recognition of the complex and competing influences on editorial legal decision-making in the contemporary journalistic field, inform a more sophisticated conceptualisation of the chilling effect, and related rights of privacy, reputation and freedom of expression?

It was suggested in Chapter Two that for the chilling effect concept to be useful in a policy and legal context, the term must be analysed and applied with precision, following Schauer's helpful schema (1978). A more precise analysis is required in policy contexts. Although sometimes used as such, the chilling effect is not a particularly helpful label for *legitimate* deterrence of *illegitimate speech*, where it is accepted that restriction of speech is acceptable in particular conditions (where socially desirable or beneficial). It is more likely to be used as a pejorative label to describe scenarios where

it is considered that there is *illegitimate* deterrence of *legitimate* speech (which may have been permissible within the current legal framework and therefore require reform); we cannot, however, assume this is what the speaker means. For this reason, no single definition has been attempted in this thesis. Rather, the focus should be on further scrutiny of the substance of legitimate speech, which is likely to be defined differently by different actors.

The empirical chapters then attempted to set out the ways in the chilling effect has been interpreted in media discourse and jurisprudence. This included a spectrum of ideas: from sophisticated definitions offered by in-house lawyers which described the deterrence of (a) publication of *defensible* information and (b) settlement of complaints over *defensible* information, to simpler interpretations which recognised a general fear, or direct threats resulting in non-publication. Some journalists and bloggers did not recognise the chilling effect at all.

The data gathered from publishers unequivocally suggested there is no fixed definition or universally perceived chilling effect by journalists and online writers. Despite its generalised use in relation to libel in media and judicial discourse, it clearly means different things to different people. While the chilling effect is very real to some writers, they interpret it in different ways, offering definitions based on variable components, such as access to resources, legal knowledge and personal experience. Furthermore, the 'chill' is perceived at a variety of stages of the editorial process, directly and indirectly (Barendt et al., 1997). This suggests the climate is not universally chilly for publishers in England and Wales; it can be more confidently described as hazy, with some people feeling the cold more than others.

There is clearly a mixed bag of interpretations of the chilling effect and its existence or level is not easily determined. Is it enough to leave it at that? Taking another example, when Morrison and Svennevig found a lack of any firm definition for the public interest,

recognising that it was 'not a universally-understood "shorthand" description' among the general public (2002, p.4), they suggested that more clarity and precision was called for:

It is one thing, even though a precise definition could not be given, for media personnel and others to consider that at the working level they understand what the term 'public interest' involves. It is quite another matter when, at the popular level, the term gives rise to some confusion. (2002, p.4)

A similar point can be made with regard to the chilling effect. To an extent my research indicates there are shared professional understandings of the concept, but given its pivotal role in helping make policy and legal decisions, further clarity is needed, especially if there is a risk of confusion, in the ways discussed below.

A web of competing influences

As well as direct and indirect legal threats, other factors that should be paid particular attention to, when understanding the suppression or abandonment of a story include:

- The position of the journalist (experienced, inexperienced, track record etc.)
- Perceived public appetite for the story (difficult to determine, though can observe through everyday interactions, interviewing people, observing social media themes)
- Media appetite for the story (can observe through published content, by talking to peers, following social media)

These factors are not necessarily separable from legal considerations:

- The journalist's track record may affect whether the producer or editor has complete confidence in the story which is needed for a legal defence

- A public appetite might give weight to a public interest defence (although it must be remembered that the law does not consider public interest to be synonymous with the public's interest in a story)
- Wide media coverage of a story might – but certainly not necessarily – *protect* a publication from legal action, owing to the practical problems a claimant would face when pursuing numerous actions; they may also be deterred by the social recognition of a story's value or wish to avoid drawing any more media attention to allegations

Importantly, as the Pollard Review report showed, influences are not easily documented and even within one institution interpretation of the factors that deterred production or publication may vary dramatically between different individuals. Deterrence may be connected to deeply buried legal and/or social concerns, which are never even shared with colleagues, let alone documented formally. Further still, a journalist may not even be conscious of the reasons they were deterred from pursuing a story; certainly when criticised for ignoring a story, journalists have shown a lack of self-awareness, at least in public commentary – for example, on the media omertà surrounding allegations about Jimmy Savile, or the neglect of the phone hacking story by a substantial portion of the national media until July 2011.

The rights of the public

Collective non-coverage of important issues can come at the cost of the wider public's right to freedom of expression, which includes an explicit right to receive information. Furthermore, the media's exertion of its own freedom of expression, in some circumstances, could potentially infringe the free expression of others, as was seen in an example given in Chapter Two when various newspapers sought to prevent the admission of evidence from anonymous journalists to the Leveson Inquiry. It has been persuasively put by O'Neill that there should not be unrestricted rights of free expression for media conglomerates (2002) and that there needs to be more emphasis

on the needs of audiences (2011).¹⁵⁰ As was suggested in Chapter Two there can even be negative side-effects or 'incidental chills' brought about by measures to reduce the chill: the deterrence of other kinds of socially desirable activity – for example, relaxed regulations on the media may deter the entry of individuals into public life, for fear of mistreatment in the media without suitable channels for redress. These observations suggest that the conceptualisation of the chill must be extended beyond the media's rights. It is possible that the media's right to freedom of expression, in some circumstances, can damage a wider public right to freedom of expression, or cause undesirable side effects in deterring other public interest activity.

Beyond the existential

Literature and public discussion around the chilling effect has often been preoccupied with its veracity and determining whether it really exists or not – is it a myth or reality? (see, for example, Cheer, 2008; Dent and Kenyon, 2004). This is understandable, given that judges have frequently used the chilling effect in their rationalisation of the weighting given to freedom of expression, and it has influenced the development of actual media law and policy.

As this thesis has shown, the chill is recognised in social and legal sources as a tangible phenomenon, which exists at various levels. However, this thesis suggests that the question of whether the chilling effect is real is a futile one. In reality, researchers are confronted with perceptions of a chill, which are defined by different actors in highly subjective terms. The factors which influence the perception of a chill are variable and even measurable, but these factors shift depending on the definer's position and perspective. Instead, it is proposed that issues around freedom of expression and the detrimental effect of media laws, such as defamation and privacy, can more usefully be answered through a series of alternative questions:

- What factors contribute to an individual or organisation's perception of the chill?

¹⁵⁰ See *Steel v Morris* [2005], para 89.

- How do these factors vary in different legal and media environments?
- Is it possible to measure the change in these factors year-on-year, and can this be correlated with changes in media output?
- Do individuals and organisations feel they have autonomy in their publication decisions?
- What factors affect a perception of editorial autonomy?.

This is not say that the chilling effect is not real to the people who feel it, nor that the factors they identify as contributory to the chill do not affect their behaviour. Cohen has described how describing a series of events as a 'moral panic', and recognising social problems as socially constructed, is not to deny their existence, or 'issues of causation'; it points to a 'meta debate' about 'what sort of acknowledgement the problem receives and merits' (Cohen, 2002, p.viii; xxxiv). Similarly, to unpick the chilling effect definition is not to deny the social factors which have led to an individual's recognition of a chill. It is not to downplay the theoretical relevance or social significance of the concept. It is merely an attempt to accurately identify the chilling effect as a subjectively constructed phenomenon and to re-orient research towards the factors that lie behind a commonly-defined perception, which lend themselves better to measurement, for example, the number and nature of claims and outcomes, or better still, the number and nature of threats and settlements made by media organisations. These discrete measurements can then be explored and examined alongside the subjectively articulated perceptions, gathered through interviews, surveys and other sources.

Any attempt to define the chilling effect relies on equally subjectively defined concepts: namely, the public interest and rights to freedom of expression, privacy and reputation. The courts have the difficult task of assessing the circumstances behind these asserted positions and deciding how best to balance competing rights. The best that media law researchers and analysts can do is to find ways of mapping and measuring the relevant factors that contribute to the perceived chill and make policy recommendations for

improving the rights of individuals and groups that we assess to be detrimentally infringed.

The distinct ambiguities of the chilling effect call for further study, rather than less. While its complexity has already been acknowledged in scholarly work (notably Schauer, 1978; and more recently Kendrick, 2013), there is scope for further examination of the subjectivities and complexities at play in freedom of expression negotiations and disputes, by gathering new empirical material and building on past research conducted, for example, by the Iowa Libel Project (Bezanson, Cranberg and Soloski, 1985), Newcity (1991), Dent and Kenyon (2004), Cheer (2008) and Baker (2008). Such a theoretical exercise would have practical purpose as well. A more nuanced definition and recognition of the moving component parts of the chilling effect would help inform on-going policy making around media dispute resolution, libel and privacy, as well as broader issues related to online freedom of expression. It would also help establish that policy initiatives designed to *eliminate* or *reverse* the chill¹⁵¹ would be futile, given its subjective form; instead a more realistic policy aim is to help *reduce* the illegitimate deterrence of freedom of expression with more effective systems for resolving disputes and dissuading claimants from bringing or threatening unfounded claims.

The impact of the current law needs to be carefully monitored to assess whether the existing law is fair and proportionate for all parties and, if not, inform the development of future legal reform. If evidence suggests that the existing infrastructure wrongly discriminates against legitimate speech, it logically follows that there should be improved mechanisms for exposing the subjective positions and weighing the balance between the right to freedom of expression and competing rights. Such improvements will not be made easily. As was shown in Chapter Six, a lack of data about defamation and privacy disputes limits informed and educated media policymaking and legal

¹⁵¹ As claimed by the UK Government with the Defamation Act 2013, which said the chilling effect would be 'reversed' (Ministry of Justice, 2013c).

reform. The last chapter sets out conclusions and recommendations on the collection of data, future policy development and finally, suggestions for future research to develop the theoretical conclusions presented here.

8. Concluding recommendations: Policy gaps and options

...to the extent that publics and policy-makers can understand better the factors that shape journalistic production, they are in a better position to demand changes that will help journalism better serve the needs of democratic societies. (Benson, 2010a, p.615)

This thesis has suggested that the perceived chilling effect is unsystematically documented, if at all. It has shown that there is inadequate monitoring of the outcome of claims in court, and extremely little known about the number and nature of claims settled out of court, severely hampering informed law and policy making and detrimentally affecting public understanding of libel and privacy law. This thesis offers empirical evidence that sheds some more light on publishers' and media lawyers' experiences; it finds, for example, that at the time of research, libel remained a dominant legal concern, manifested in threats and claims against publications, despite a general perception of runaway privacy law (voiced by participants and in media reports). But more official data are needed to test and substantiate and update these findings as the law further develops.

Policymakers have also neglected to pay enough attention to individuals and smaller media organisations and their interactions with libel and privacy law. While small bloggers are mentioned (and in fact played a central role in the Libel Reform campaign), recent attempts to address the chilling effect of libel law through the creation of a new statute, the Defamation Act 2013, a proposed costs reform framework, and the development of a new system of press regulation, have largely concentrated on large media publications, defined in statute and by the UK Department of Culture, Media and Sport as 'relevant publishers'. In response, this thesis offers new and original data on the experiences of a group largely absent from these discussions: bloggers and small-scale publishers whose freedom of expression rights also deserve robust protection,

especially as mainstream media organisations cut back on important activities such as court reporting, local news coverage and investigative journalism (see, respectively, Davies, 1999; Ponsford, 2012a; Communications Committee, 2012). New policy should also address these issues – for which recommendations are made below.

Media policymaking is a particularly curious beast because the key stakeholders in the debate, the main media organisations, control the primary means of communicating the process and outcome to the wider public. This adds an extra political dimension. As discussed in Chapter Three, particular media policy topics may be shaped as a result of direct or indirect pressure from owners, or journalists' and editors' own views on the way their industry should be regulated. Some topics may receive more coverage as a result of this and others may be neglected; certainly there is substantial evidence that institutional bias can drastically affect the nature of coverage (see Freedman, 2008; McChesney, 2004; Curran and Seaton, 2009). Recent notable examples include coverage of data protection law (in Barnett and Townend, 2014b), the phone hacking scandal, press regulation and the Leveson Inquiry in the UK (Bennett and Townend, 2012; Townend, 2013b) and media ownership in the US (Cripps, 2014). Some key areas of media legal policy are strangely ignored, or receive heightened attention at particular periods, before dropping out of the news agenda – as was seen in the coverage of super injunctions in 2011.

While all policymaking and political processes are subject to media news choices, and in turn the various influences shaping those, the media legal policy environment is particularly vulnerable to interference by owners and commercial interests. Beyond sustaining the media's own interest (for example, promoting a regulatory framework to suit commercial growth) there is another power the media holds, explored at length in the Leveson Report: it controls the channel between politicians and the public across all areas of civic life. This gives media organisations, especially around general election time, a very particular hold over politicians seeking re-election and public favour and

has led to a reluctance by politicians to strongly criticise or introduce policies unpopular with the media, namely the national printed press.

This balance of power is open to change and is probably in the process of changing, with the entry of new digital players and publications influencing the public's perception of politics, but the press-politics relationship (overly close, according to many witnesses to the Leveson Inquiry) has been instrumental in developing the current media policy landscape. Despite the dramatic growth in size and influence of technology companies providing the news infrastructure (Twitter, Facebook and Google, for example) and the proliferation of individuals and small organisations using their platforms, it has been the organisations associated with national printed newspapers that have dominated recent media regulation debates. At best this institutional media preserves and values freedom of expression for the good of the public; at worst, it prioritises institutional freedom of expression over the public's wider right to receive information and participate in public life.

Policymaking is not solely national in nature either: as Raboy has argued, media policymaking has shifted from 'a field essentially defined by national legislative and regulatory frameworks and a minimum of international supervision ... to a complex ecology of interdependent practices, structures and institutions' (2007, p.343). Developments and reform in media law are made in the context of this global ecology and subject to the realpolitik of policymaking described above.

This thesis has looked at the way in which large and small organisations, as well as individuals, operating in a networked and globalised environment, are affected by defamation and privacy law. Policy and legal change is both inevitable and necessary in a fast-changing digital environment, in which publishers are often working in the absence of specialist lawyers. To avoid inefficient and unnecessarily repetitious policy cycles and to make the process more democratic and equitable, more continuity and

transparency is needed (see Napoli, 2014). This short and final chapter considers some of the problems of digital media-legal interactions exposed in this thesis and sets out recommendations for how they might be addressed.

8.1. Informing the policy process

Stakeholders

The development of an appropriate and fair policymaking process that recognises the needs of a variety of stakeholders

Major stakeholders have influence at all stages of the process: in campaigning for policy change and at the time of its inception; during the debating and shaping of policy until its introduction or abandonment; and afterwards, in calling for its de-activation or for it to be left alone. Well-resourced commercial organisations are particularly well equipped to participate in this process: to schedule time for writing and coordinating proposals and to engage in political discussions. Media organisations are especially well-armoured here, with direct access to politicians (Leveson, 2012c, pp.1115–1451 Part I) and control of policy publicity through their own publications and channels. In a pre-digital age, media legal issues were likely to be of greatest concern to these types of institutions, given the limited means of production and publication. Now, however, with the ever-faster digital flow of information (albeit reliant on new kinds of gatekeepers), media law is ever more pertinent to other types of players: ordinary members of the public engaged in blogging and social media activity and less well-resourced organisations, such as non-profits, and hyperlocal information and news providers. As reported in Chapter Six, a search of a sample of defamation claims from 2009-12 indicated the significant proportion of non-journalism and media related claims. Media organisations are undoubtedly strongly affected by defamation, but there are also other parties to consider. The policymaking process should be adapted to increasingly engage with small, as well as big players: those publishing in decentralised ways, who might not be represented by lawyers, nor an industry association. Further still, members of the public who might not realise they will be affected by new policy measures (for example,

media audiences), should also have greater involvement, through more proactive consultation and research processes, with less reliance on commercial media organisations for the communication of policy processes and proposed reforms.

Concentrating and relying on the evidence of large and well-resourced organisations may lead to neglect of the everyday implications of new laws and systems. Crucially, smaller and lone publishers must play a greater role in the shaping of new systems of ADR and the reform of defamation costs. This is made as a broad recommendation, but there are numerous ways this could be achieved: better and wider publicising of consultations online and through civil society groups, in shorter and simpler response formats; a wider range of witnesses could be called to select committee inquiries; specific research on the impact of proposed reforms could be commissioned by government (beyond the Impact Assessment exercise which tends to rely on pre-existing research and data). There is also a role for legal and media academics to participate in this policy space (as many already do), although to do this effectively is not without its challenges; as Schlesinger notes, '[i]nfluencing the terms of debate is difficult because the shaping of policy has become both more competitive and more complex' (2009, p.13).

Monitoring the data

More systematic collection of data about defamation and privacy law

This thesis has identified very serious and unnecessary data gaps in the evidence informing defamation and privacy legal policy development. There is a need for more evidence-based reform, which instils robust methods for tracking the impact of reform, where possible (cf. concerns about evidence raised by Mullis and Scott, 2009, 2014). As indicated by a number of recent parliamentary and judicial reports – some partly instigated by a short supply of data – there is widespread concern about the lack of evidence in this field, which has an effect on related procedural and statutory legal reform. 'Closed' and fragmentary data on defamation and privacy litigation, exposed by

interrogation of official and unofficial records in this thesis, damages the policy-making process, public debate and academic research around these issues of public interest. This is particularly significant as attempts are made to introduce a new arbitration service to resolve civil complaints based on Leveson LJ's recommendations, and defamation costs are further reformed.

Without changes to the way data are collected and collated, it will be impossible to monitor the effect that the new Defamation Act 2013 has on litigation activity, now its provisions are in force,¹⁵² or assess the potential for new legal reforms, such as the introduction of specific legislation to deter 'strategic lawsuits against public participation' (SLAPPs) (see Scott, 2011, and below). The various concerns and recommendations voiced by the committees discussed above need to be taken seriously by the government as part of its policy on transparency and accountability of governmental services (Gov.uk, 2014b). 'Open data' initiatives in the courts should incorporate the civil as well as criminal law.¹⁵³ Data on civil litigation, costs, type and detail of cases also need to be carefully monitored and made available to the legal profession, journalists and researchers, as well as the wider public, in a cost-efficient and practical way. This heightened accountability should not impede the courts' administration of justice but will ensure, for example, that members of the public are able to easily access an official figure concerning the number of libel trials that have taken place, rather than an estimate or supposed number. As it stands, we know very little information about even the tip of the defamation and privacy iceberg. New ways to monitor above and underwater activity are needed.

There are a number of practical ways this could be brought about: within the pre-existing system, HMCTS should start recording the outcome of defamation and privacy

¹⁵² Cases under the old law will be able to be brought until the end of 2014.

¹⁵³ The Ministry of Justice's open data strategy for 2012–15 covers both civil and criminal courts (Ministry of Justice, 2012b). However, civil courts have been given scant attention in the Cabinet Office consultation (2011) and the Government's wider open data project, despite the media and political attention given to civil issues, such as litigation costs and family law.

cases and reporting this data to the Ministry of Justice, which should publish a summary on a quarterly basis. At the moment interim and final privacy injunctions are reported by judges or their clerks to the Ministry of Justice, but it seems sensible to make the outcomes and progression of all defamation and privacy cases a central part of everyday HMCTS administrative process. As many judgments as possible should be made available online.

A slightly more ambitious suggestion is to create a modestly sized communications and information law data collection hub based at the Ministry of Justice, which draws on external academic expertise, the views and experiences of a range of stakeholders and collates data about courts and pre-court activity in the law of media, information and communication. The Ministry of Justice would work with HMCTS personnel and legal firms to collect and analyse relevant data and inform legal policy development and academic research. It might implement an open case tracker, in which active cases are listed online, and their progression and status can be tracked (and completed or discontinued cases archived in a searchable database). This could be introduced as a pilot by the Ministry of Justice digital services team and potentially rolled out more widely to other areas of civil law.

Informing legal reform

An opportunity for public media legal education

The empirical research presented in this thesis revealed that having a low level of resources does not necessarily lead to a heightened perception of the chill and over-restriction of public interest material, nor increased numbers of threats and libel or privacy suits. One reason for this could be that a significant proportion of bloggers and small-scale publishers (especially in local contexts) are less likely to cover legally sensitive topics, or write about people with the resources or inclination to sue. Separate research in 2013-14 that surveyed over 180 hyperlocal media outlets indicates that many local bloggers are doing important and legally risky reporting on topics such as

local government corruption, but by no means all, with only four in ten indicating that they have started a campaign or investigation in the last two years (Williams et al., 2014; Barnett and Townend, 2014a).

Additionally, bloggers might avoid libel threats because they are perceived to have less public influence than mainstream media, but this is not guaranteed. However, at the moment there is no special protection from costs or damages because of their modest size and the effect of even one such threat or action could jeopardise the future of their operation. This, coupled with the fact that some answers indicated ignorance or misconceptions about the reach of the law, necessitates the creation of better support and training systems. Knowledge and advice can help prevent an inadvertent libel, but also enable an uncertain writer to act within the full limits of the law and avoid excessive self-censorship. To help protect bloggers and small publishers, especially in local and community settings, policymakers would do well to consider how libel and privacy training might be developed in different educational settings, through schools, universities and non-profit organisations. There could, for example, be opportunity for the BBC to provide legal education and general information to community publishers, as part of its development of online and creative partnerships (Hall, 2013; Harding, 2014). The government and other relevant agencies could also consider making funding available for public legal education projects, specifically teaching members of the public about libel and privacy law.

8.2. Improvements for dispute resolution

The development of more proportionate dispute resolution methods that deter unmerited claims

The thesis has established that most defamation and privacy relation dispute activity takes place outside the courts. This gives rise to important but surprisingly neglected question: are the courts necessarily the best place to deal with these types of disputes? Could a different type of dispute resolution process be more effective in deterring

unmerited claims, while recognising the right to redress for legitimate complainants? The Alternative Libel Project report (English PEN and Index on Censorship, 2012) made numerous recommendations but they have received little political traction. There is a greater push for ADR and early resolution (see Dyson, 2014, p.1), and arbitration is likely to be developed as part of new systems of media regulation, but its future is uncertain.

A key issue for policymakers should be the development of dispute resolution methods for bloggers and small publishers that would help avoid the risk of expensive litigation and deter illegitimate claims or unnecessary and hasty settlements. Various forms of mediation, arbitration and Early Neutral Evaluation (ENE) are considered in the Alternative Libel Project report (English PEN and Index on Censorship, 2012) but need further exploration and testing. One concern that would need to be addressed is whether an increased use of ADR could stymie the development of relevant case law. Another is whether it would encourage more unwarranted claims which are currently deterred by the expensive and cumbersome courts process.

An additional policy option that could be explored is the development of specific legislation to deter 'strategic lawsuits against public participation' (SLAPPs), based on anti-SLAPP state laws in the US, although designing appropriate legislation would present a number of significant challenges, not least because of the subjectivities at play when determining the legitimacy of actions (Scott, 2011).

8.3. Future research

This thesis has concentrated on activity within one particular jurisdiction, England and Wales, but further attention needs to be paid to inter-jurisdictional and global media-legal environments. This research surveyed journalists and bloggers publishing to a substantial audience based in England and Wales, but they are not immune from actions and threats brought in other jurisdictions, in and outside of Europe. Similarly, journalists and bloggers based in other jurisdictions may face threats from England and

Wales, and claims may be brought if a plausible and significant connection to the jurisdiction is established. Future research would do well to consider the challenges of the globalised media-legal space, in order to help develop better internet policy and legal frameworks for protecting legitimate expression and the public's right to impart and receive information, as well as advance conceptual understanding.

Location

This chapter opened by citing Benson, who argues that the more that publics and policymakers 'understand better the factors that shape journalistic production, they are in a better position to demand changes that will help journalism better serve the needs of democratic societies' (2010a, p.615). It is hoped that the policy recommendations set out above would help develop a better understanding and more informed changes with democratic benefits. In Benson's view, comparative research will help 'honestly and directly' answer questions about journalistic production and journalism (2010a, p.615). He suggests that multi-country studies, covering three to ten nation states with constant variables (such as ownership concentration) could help test effectively for the effect of government policy, such as libel (2010a, p.621). This approach would not be without its problems (as discussed in Chapter Seven), but seems an excellent starting point with which to develop the research and findings of this thesis.

This is especially important when developing the notion of the networked news 'ecosystem'. Anderson, Bell and Shirky's report focused on North American media and it cannot be assumed that their conclusions about the nature of the news ecosystem apply universally. As Nielsen suggests, it would be sensible to test 'analytical insights' from the report comparatively, paying attention to structural differences (2012). The globalised environment described in this thesis is particular to media-legal interactions within the jurisdiction of England and Wales. While it has drawn inspiration from the 'post-industrial' ecosystem described by Anderson, Bell and Shirky (2012), it recognises that the characteristics of a new news network are strongly related to national media

systems (for example, through sources of funding and types of advertising). Such a framework might prove useful for future comparative research about the media-legal interactions within a country, but it cannot be assumed that the observations made in England and Wales directly translate to other countries, even those with comparable media or legal systems. Since the publication of some of my survey findings, there has been interest from researchers in developing an equivalent questionnaire in Poland;¹⁵⁴ such an exercise would offer useful comparative data with which to re-appraise the findings in England and Wales.

Subjects

Finally, Wahl-Jorgensen has suggested that study of decentralised newswork provides an opportunity to look at different types of actors involved in journalistic production and practice. In her view, emerging ethnographic work on news audiences allow a focus beyond the 'factory floors' of news organisations (2009). In the context of media legal research, future research would do well to pay attention to the consumers of media, including legal complainants, in making sense of defamation, privacy and freedom of expression in the contemporary networked news environment.

Research positioning

At the very beginning of this thesis, this research was described as falling into a category of socio-legal media and communications research. It is not a formally recognised sub-discipline, but there is a growing body of work that might be classified as such, which adds great value to the social interpretation of media law in practice. It is hoped that socio-legal and interdisciplinary approaches, using social research methods, will be increasingly used and recognised by scholars in media-related legal studies and social sciences. This, in turn, will help inform the development of legal and regulatory reform by policymakers and practitioners.

¹⁵⁴ At the National Information Processing Institute (OPI).

This thesis has taken a socio-legal approach, combining the methodologies and literatures of media sociology and law, to explore the notion of the chilling effect (a socially recognised phenomenon as well as legal doctrine) and the relationship between defamation, privacy and journalistic practice in England and Wales. It has suggested that previous sociological studies on news practice have neglected to fully explore the role of the lawyer as gatekeeper or legal influences on output, while legal analyses left room for further exploration of social interpretations of the chilling effect and the two-way interaction between journalism and law, in shaping legal policy and concepts. This study aimed to fill this gap and argued that specialist lawyers are deeply embedded in the editorial process, with a specific and important gatekeeping function which enables as well as inhibits the flow of information.

It suggested that contemporary editorial decisions are made in the context of a globalised and networked news environment, giving rise to new types of media-legal interactions and problems for media policymakers to grapple with. Given the complex web of competing influences on everyday news decisions, it was suggested that analytical focus should be on the component parts of the chilling effect concept, such as access to legal resources, legal knowledge and experience, which will help improve the efficacy and social benefits of media legal policy reform. More extensive and accurate data collection on both formal and informal media legal interactions would assist the development of more proportionate legal dispute mechanisms and public legal education initiatives. Finally, it was suggested there is scope for comparative research that pays attention to the peculiarities of national media and legal systems, while recognising global information flows, and the influence of different actors, such as audiences and legal complainants.

Over fifteen years ago Barendt et al. (1997) gave a succinct overview of the impact of libel on the media, recognising the notorious complexity of defamation law and the non-

uniform manifestation of the chilling effect. Re-visiting similar topics today, it is clear the media landscape has dramatically changed but courts systems have not. It is still a period of great upheaval, with uncertainty of the future of press regulation, or even the longevity of the press as its own discrete category. There are enormous challenges for small and large media organisations in protecting and enhancing the public's freedom of expression but also great opportunities afforded by digital technology; legal systems and procedures need to be adapted efficiently and transparently to help them perform that vitally important role.

Appendix 1

Glossary of legal terms and abbreviations

This list contains explanations for some of the key legal terms and concepts mentioned in this thesis. For a full explanation of these media legal terms and others, including defences in defamation and privacy, see Gatley (Parkes et al., 2013); Defamation: Law, Procedure and Practice (Price, Duodu and Cain, 2010); and McNae's (Dodd and Hanna, 2014).

ADR: Alternative Dispute Resolution, means of resolving cases without litigation – through mediation, Early Neutral Evaluation (ENE) or arbitration, for example.

CFA: Conditional Fee Agreement (or Arrangement). Also known as 'no win, no fee' arrangements. Whereby a solicitor works for a conditional fee, only payable if the case is won, although the client may be asked to take out an insurance policy in the event of a loss (See Chapter Four).

Breach of duty of confidence: An equitable action, which was often used as a means of protecting individual privacy. Misuse of private information has now developed as its own cause of action (see below).

Claimant: Formerly known as the Plaintiff; the complainant in a civil case.

Claim form: Formerly known as the writ. The document filed in court than initiates a defamation or privacy action.

Cause of action: The combination of facts that give rise to a claim.

Case law: The way in which previous cases and the interpretation of judges of the common law develops precedents for use in similar cases.

Common law: Law based on the decisions of judges rather than parliamentary statute.

Defamation: Publication of a statement to a third party which harms the reputation of the complainant. Its most common form is libel, in a written and permanent form (but including broadcasting and social media material); slander is a transitory and spoken form of defamation.

Defendant: The person and/or company defending the claim; the publisher or individual/company responsible for the publication in question.

Defence: The statement of case for the defendant. There are three main defences in a defamation case: truth (justification), honest opinion (formerly fair comment) and privilege. In a privacy/confidence action, the main defences are: that publication is in the public interest, consent was given, and that the information is not private (or too trivial to merit protection).

District Registries: A district registry is part of the High Court located in different districts of England and Wales, dealing with civil business. Records are not kept but is unlikely that many defamation and privacy claims are filed in them.

HMCTS: Her Majesty's Courts and Tribunals Service, an agency of the Ministry of Justice.

Injunction (interim and final): A court order specifying that something should be done, or is prohibited.

Lawyering / legalling / libel reading: All terms used to describe lawyers' checking of journalistic material (copy).

Limitation period: The time in which a claim must be brought. Usually in defamation cases it is 12 months from the date of publication of the material complained of, although it can be extended at the court's discretion. The Defamation Act 2013 introduced a rule bringing online material within this limitation period.

Malice: An improper or dishonest motive of the publisher; can be used to deprive a defendant of some defences in a libel claim.

Meaning: Needs to be established to determine whether a statement is defamatory; may be defined as 'Chase Level 1, 2 or 3' with regard to the severity of an allegation of guilt (after *Chase v Newsgroup Newspapers Ltd* [2002], para.45).

Misuse of private information: A new cause of action developed from the law of breach of confidence; recognised as a distinct tort in *Vidal-Hall & Ors v Google Inc* [2014].

Night lawyer: A lawyer employed on a freelance basis to 'libel read' a newspaper before it goes to print; often members of the junior bar.

Offer of Amends: A statutory provision which allows a defendant to accept responsibility for the publication; by doing so they commit to making a suitable correction, apology and pay compensation and costs as agreed or determined (likely to be lower in reflection of the offer of an early apology etc.). Introduced to help settle cases early and may be used as a defence if not accepted by the claimant. Can be part of a "Part 36" offer to persuade the other party to settle.

Particulars of claim: A document filed at court which contains details of the case against the other party; formerly known as pleadings. Can usually be requested from the court for a small fee per claim, if the claim details are known.

Procedural law: Rules that govern how the law should be applied (cf. *Substantive law*).

Queen's Bench Division (QBD): deals with contract and tort (civil wrongs), judicial reviews and libel within the High Court.

Reynolds defence: A specific kind of qualified privilege, based on ten criteria for responsible journalism, introduced in the case *Reynolds v Times Newspapers* [1999]. Now replaced by a new public interest test in the Defamation Act 2013.

Right of reply: Usually used to describe how subjects of stories are given the opportunity to respond to an allegation; might assist defence of a future libel claim.

Royal Courts of Justice: accommodates both the Court of Appeal and the High Court (and within the High Court, the QBD).

Statement in Open Court (SIOC): A statement agreed by both parties that can be read out in open court to settle a claim.

Substantive law: Rules governing the merits and subject of the dispute (cf. *Procedural law*).

Super injunction: An injunction prohibiting the reporting of its existence, but used more loosely to describe anonymised injunctions prohibiting reporting of private information (see Chapter Six).

Summary judgment: When a judge dismisses a claim or enters final judgment at an early stage.

Tort: A civil wrong for which damages can be awarded in civil law.

Appendix 2

Sample interview questions

These are examples of some of the questions interviewees were asked, tailored to each interviewee; interviews took different directions, however, depending on the views and experiences offered.

Day to day work

- What sort of legal work do you do [tailored to interviewee]? How much is claimant, and how much is defendant work?
- What is your role in the editorial process? How would you describe your relationship with journalists?
- How have you ended up doing specific types of legal work, and how have you developed your specific specialism in media law?

Legal issues

- What do you perceive as the biggest issues in privacy and libel law at the moment?
- Could you describe some of the negotiations about the balance between freedom of expression and the right to privacy, or reputation?
- Are you mainly concerned about legal action within England and Wales, or in other jurisdictions as well?

The chilling effect

- How do you define the 'chilling effect'? Do you recognise one?
- Do you see a difference between the 'chilling' effect relating to privacy and defamation?
- How would you describe the relationship between the substantive and procedural law and the 'chill'?

ADR

- What do you think about the various methods of alternative dispute resolution mechanisms that are currently being discussed? How do you perceive that they could help reduce the 'chill', if you think there is one?

Data access

- Lord Justice Leveson has been asking in-house lawyers about the 'audit trail' around the journalistic process (for example, around establishing the public interest in pursuing a certain line of inquiry). How would you describe the tracking systems in place at newspapers and law firms with regard to journalistic practice?
- I am attempting to put together a set of data about legal interactions at newspapers that would document pre-action letters and claims. How would you suggest I go about collecting that information?

Appendix 3

Interviewee summary

Formal semi-structured interviews with media law specialists, which all took place in central London

Code	Description	Type / Date
YA	Solicitor / researcher	In person, Nov 2011
YB	In-house lawyer (newspaper)	In person, Feb 2012
YC	Legal academic	In person, Feb 2012
YD	Barrister	In person, Feb 2012
YE	In-house lawyer (broadcaster)	In person, Feb 2012
YF	In-house lawyer (NGO)	In person, Feb 2012
YG	Solicitor	In person, Feb 2012
YH	Barrister / night lawyer	In person, Mar 2012
YI	In-house lawyer (newspaper)	In person, Mar 2012
YJ	In-house lawyer (newspaper)	In person, Mar 2012
YK	Journalist / legal advisor	In person, Mar 2012
YL	In-house lawyer (newspaper)	In person, Apr 2012
YM	Solicitor	In person, Apr 2012
YN	In-house lawyer (newspaper)	In person, May 2012
YO	Solicitor	In person, Jun 2012
YP	Solicitor	In person, Aug 2012
YQ	Barrister	In person, Jan 2013
YR	In-house lawyer (NGO)	In person, Mar 2013
YS	Journalist / legal advisor	In person, May 2013

As well as these, the research was also informed by a series of less formal meetings and telephone calls with a range of barristers, solicitors and media law specialists, including another two in-house newspaper lawyers; I also met numerous other lawyers at conferences and debates over a three year research period. Barristers and solicitors tended to have experience of both claimant and defendant work, but as indicated in Chapter Four, some did more of one than the other, particularly at specialist solicitor firms.

Appendix 4

Survey respondent summary

The tables below give some information about the following categories in each survey (general and hyperlocal):

A. Journalists mainly publishing on third party sites (including an employers')

B. Journalists mainly running their own organisation

C. Online writers mainly publishing on third party sites

D. Online writers mainly running their own website or blog

Respondents' profiles	Journalists (A&B)		Online writers (C&D)	
	General	Hyperlocal	General	Hyperlocal
Total number	81	34	25	52
% live in England and Wales	92	100	88	100
Average years experience	14	14	7	8
% paid for journalism / writing	88	71	35	20

Content type - journalists	Main publication (A)		Own publication (B)	
	General	Hyperlocal	General	Hyperlocal
Total number	67	13	6	21
% national	30	46	0	0
% regional	22	39	50	62
% special interest	42	0	33	0
% other	6	15	17	38

Content type – online writers	Main publication (C)		Own publication (D)	
	General	Hyperlocal	General	Hyperlocal
Total number	8	16	15	33
% recreational	63	44	73	61
% academic	13	13	20	9
% citizen journalism	38	69	47	82
% non-profit / campaign	13	44	47	27
% company site	75	25	20	33
% other	38	31	20	24

Platforms used - journalists	Main publication (A)		Own publication (B)	
	General	Hyperlocal	General	Hyperlocal
Total number	65	13	6	21
% print newspaper	37	31	0	5
% print magazine	31	23	17	5
% television	14	0	17	0.0
% radio	11	8	17	0.0
% online	89	92	100	100

Size of main publication - journalists	Main publication (A)		Own publication (B)	
	General	Hyperlocal	General	Hyperlocal
Total number	68	13	6	21
% with ten or more employees	72	62	0	0
% with fewer than ten employees	28	39	100	100

Abandon public interest stories because of libel law – journalists	Main publication (A)		Own publication (B)	
	General	Hyperlocal	General	Hyperlocal
Total number	61	10	5	19
% All of the time	0	0	0	5
% Most of the time	0	0	0	0
% Some of the time	59	40	60	53
% None of the time	41	60	40	42

Abandon public interest stories because of libel law – online writers	Main publication (C)		Own publication (D)	
	General	Hyperlocal	General	Hyperlocal
Total number	8	16	14	29
% All of the time	0	0	0	3
% Most of the time	0	0	7	0
% Some of the time	50	38	50	24
% None of the time	50	63	43	72

Appendix 5

Freedom of Information request to BBC

Extract from BBC Information Policy & Compliance response to request made under the Freedom of Information Act 2000, 19 October 2012 (Reference: RFI20120955)

Thank you for your request of 11 September 2012 under the Freedom of Information Act 2000 seeking the following information:

1. a list of the defamation actions the BBC has been involved in during the past five years, 1 September 2007 – 31 August 2012;
2. the way in which each of these actions were disposed of;
3. the costs involved in each case;
4. the number of occasions on which the BBC has settled a defamation dispute before a claim was issued in court (i.e. pre-action) from 1 September 2007 – 31 August 2012 and the costs involved in these cases;
5. a list of the privacy actions and interim injunction applications the BBC has been involved in during the past five years, 1 September 2007 – 31 August 2012;
6. the way in which each of these actions were disposed of; and,
7. the costs involved in each case.

You also sought copies of the BBC's responses to the following requests under the Freedom of Information Act 2000:

- RFI20091189 – partially disclosed;
- RFI2005000118 – partially disclosed;
- RFI2005000634 – partially disclosed;
- RFI2006000288 – all information disclosed;
- RFI2006000324 – all information disclosed;
- RFI2007000072 – partially disclosed;
- RFI2007000569 – all information disclosed;
- RFI2007000714 – all information disclosed;
- RFI20081078 – all information disclosed; and,
- RFI20100730 – all information disclosed.

As requested, please find enclosed copies of the BBC's responses to the requests under the Freedom of Information Act 2000, which have been redacted in so far as is necessary to protect the personal data of the requesters.

In relation to the first and second numbered requests above, please find below a list of the cases in which defamation claims were issued by/against the BBC in the period 01 September 2007 and 31 August 2012, together with details of their status/outcome:

- Advanced Hair Studio - ongoing;
- Amar, Mohamme - settled;
- Breen, Suzanne - resolved;
- Brolly, Ann - ongoing;
- Budu, Samuel Kingsford - struck out by the BBC;
- Bushiri, Moses - ongoing;
- Cawthorne, Rafdi - struck out by the BBC;
- D Murphy & Sons Construction Ltd – resolved;
- Daniels, Dr Chris - struck out;
- Darr, Khalid – settled;
- Data Dispatch – dormant;
- Dee, Robert - settled;
- Donnelly, Myles – dormant;
- Gilligan, Barry – settled;
- Jayaweera, Mr Dilith Susantha – ongoing;
- Jeffries, Tony – settled;
- Mackinlay, Andrew – settled;
- Malik, Hanif - settled;
- Marcucci, Paolo & Marcucci, Guelfo – settled;
- McCrory, Aubrey – dormant;
- Patel, Zarin – ongoing;
- Port, Colin – resolved;
- RHL Ltd – won;
- Ruane, Caitriona – settled;
- Scourfield, Lynden – ongoing;
- Smith, Pauline – ongoing;
- Sullivan, Richard – settled;
- Taranissi & ARGC – settled;
- Tesla Motors Ltd & Tesla Motors Inc – ongoing;
- Trafigura Ltd – settled;
- Tycon Energy Corporation (UK) – dormant;
- Tycon Energy Corporation (US) – dormant;
- Williams, Peter - struck out.

In relation to the fifth and sixth numbered requests above, please find below a list of the cases in which privacy or breach of confidence claims/injunction applications were issued by/against the BBC in the period 01 September 2007 and 31 August 2012, together with details of their status/outcome:

- A v BBC – resolved;
- AB (NI) – resolved;
- BBC v Harper Collins Publishers Ltd & others – settled;
- CD (NI) – resolved;
- Halliday, Claire – settled;
- MGN Ltd & LMN – resolved;
- Raymond, Roy – resolved;
- S v BBC – settled;
- S & others - ongoing;
- T v BBC – resolved;
- Totton, Lynda – dormant.

Please note that these claims are not limited to the jurisdiction of England and Wales. This list does not include all claims where proceedings were issued against the BBC, but not served.

In relation to the remainder of your requests, which we have aggregated given that they relate to the same or similar information, while we consider that the BBC is likely to hold some information relevant to your requests, we estimate that to provide the requested information would exceed the appropriate limit.

[Continues with details of appeal process etc.]

Extracts from previous Freedom of Information requests (by other requesters)

1. Freedom of Information disclosure by BBC, 1 August 2005 (RFI2005000634)

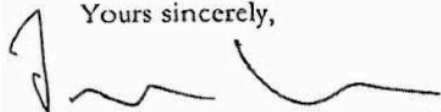
Freedom of information request - RFI2005000634

'Thank you for your request under the Freedom of Information Act 2000 ("the Act") received on 7 June 2005, seeking the following information:

Since January 1st 2003 how much has the BBC paid out in libel actions including legal fees and costs?

We have taken this request to mean that you want details of all payments made by the BBC on or after 1 January 2003 in Court cases where it has been sued for libel, including of any damages, legal costs of the BBC's defence and of legal costs that have had to be paid to opponents. The total amount of such spending during this two and a half year period was £1,780,020.

Yours sincerely,



Jaron Lewis, Solicitor
BBC Litigation Department

2. Freedom of Information disclosure by BBC, 17 July 2007 (missing reference number)

Year	Writs issued	Number that became dormant or settled without payment	Number that were settled with payment	Amount paid on those claims in settlement for damages and opponent's costs
2002	9	4	4	£74,500 damages & £223,750 costs
2003	9	4	5	£55,714 damages & £41,937 costs
2004	7	2	5	£121,000 damages & £528,262 costs
2005	6	4	2	£40,000 damages & £60,000 costs
2006	9	4	2	£55,000 damages & £7,500 costs

Please note that one case from 2002 and three cases from 2006 are on-going.

3. Freedom of Information disclosure by BBC, 11 September 2007 (missing reference number)

Thank you for your request under the Freedom of Information Act 2000 dated 19 August 2007, seeking the following information:

"How much the BBC has paid in settlement and costs of libel and defamation claims where no writ was served and in how many cases in each of the last 5 years?"

We have collated data from the last five full calendar years. Most cases span more than one calendar year. We have, therefore, extracted data by reference to the date on which the claim was notified to the BBC's lawyers rather than the date on which the case was concluded.

	Number of claims with no writ that were settled for payment	Amount paid on those claims in settlement for damages and opponent's costs
2002	3	£7,375.00 damages & £2,803.18 costs
2003	4	£0.00 damages & £8,655.00 costs
2004	4	£6,000.00 damages & £12,752.50 costs
2005	3	£4,000.00 damages & £14,500.00 costs
2006	5	£110,500.00 damages & £99,887.81 costs

4. Freedom of Information disclosure by BBC, 7 November 2008 (RFI20081078)

	Department	Month/year of broadcast / online publication	Damages	BBC Costs	Third party costs
Defamation Settlements between 01/04/2006 and 31/03/2007					
	Nations & Regions	June 2005	£15,000.00	£2,846.68	£12,000.00
	News	November 2003	£55,595.84	£21,770.69	£463,184.93
	Nations & Regions	September 2005	£15,000.00	£8,802.75	£7,500.00
	Audio & Music	September 2006	£7,500.00	£0.00	£3,500.00
	Vision	June 1997	£10,140.62	£38,800.32	£0.00
	Vision	March 2006	£20,000.00	£5,871.94	£21,000.00
Defamation Settlements between 01/04/2007 and 31/03/2008					
	Vision	March 2006	£75,000.00	£4,620.70	£75,000.00
	News	July 2006	£40,000.00	£6,785.00	£28,929.92
	News	September 2006	£15,000.00	£350.00	£2,449.88
	Nations & Regions	September 2007	£7,500.00	£0.00	£2,824.71
	Nations & Regions	August 2007	£17,500.00	£2,812.50	£0.00
	Nations & Regions		£0.00	£0.00	£100.00
	News	July 2007	£7,500.00	£350.00	£3,043.25
	News	August 2006	£12,500.00	£0.00	£9,500.00

5. Freedom of Information disclosure by BBC, 10 September 2009 (RFI20091189)

We can however tell you that our litigation records show that:

- 2005/2006 - 14 libel complaints were brought. Five resulted in £112,500 damages being paid in this financial year
- 2006/2007 - 21 libel complaints were brought. Eight resulted in £351,095 damages being paid in this financial year
- 2007/2008 - 4 libel complaints were brought. Two resulted in £75,100 damages being paid in this financial year
- 2008/2009 - 9 libel complaints were brought. Five resulted in £91,501 damages being paid in this financial year
- 2009 - 9 libel complaints have so far been brought. Five resulted in £113,801 damages being paid to date

6. Freedom of Information disclosure by BBC, 18 June 2010 (RFI20100730)

During the period 1 January 2008 – 31 December 2009 our records show 85 complaints about defamation were received. Of these the BBC settled 26 and paid a total of £363,653.05 in costs and £305,056.00 in damages.

All but five of the others were either dropped by the Claimant or were resolved successfully in Court. These five cases are still ongoing. No cases were lost at trial.

Appendix 6

A note on costs protection reform

Following the recommendations of the Jackson review of costs in civil litigation, a process which raised some of the concerns outlined in Chapter Four, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the LASPO Act) reformed the recoverability of a success fee and ATE insurance premiums in CFA-funded cases. Successful parties would have to pay success fees and any insurance costs out of their damages. The losing party would pay the other side's base costs. However, further concerns were raised about access to justice¹ and the LASPO Act's application to defamation cases was delayed until a costs protection regime, which would protect individuals of limited means against having to pay the other side's costs if the case was lost, was put in place.²

In place of the CFA and ATE premium regime for the recoverability of the losing party's costs, the government has proposed replacing Conditional Fee Agreements (CFAs), with a variation of the Qualified One Way Costs Shifting scheme (QOCS) in place for personal injury cases, which it hopes will continue to protect the position of claimants and defendants of modest means. At the time of writing, the proposed scheme had not yet been introduced. In the scheme, a party can apply for a nil-net liability costs protection order, which would limit liability to damages. In granting such a request, the court must be satisfied that

(a) the party applying for such an order would suffer severe financial hardship if an order containing that provision were not made and that party were ordered to pay another party's costs of the proceedings; and
(b) it is in the interests of justice to make such an order. (Ministry of Justice, 2013b, p.21)

There is also the possibility of capped liability for parties of modest means. Parties of substantial means (whether individuals or organisations) would be excluded from the costs protection regime. This means testing only applies to costs, not damages.

¹ Lord McNally, then Minister of State for Justice, told the House of Lords in October 2012 how 'particular concerns were raised by a number of noble Lords – the noble Lords, Lord Martin and Lord Prescott, and others – about the effect of our reforms on less well off parties' (McNally, 2012, col.935).

² Helen Grant, then Parliamentary Under-Secretary of State for Justice, announced in December 2012 that the Government had accepted Leveson LJ's recommendation that costs protection should be extended to defamation and privacy claims and would delay the enforcement of provisions relating to sections 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, which would remove the recoverability of success fees and insurance premiums, 'until costs protection has been introduced for these proceedings' (Grant, 2012, col.38WS).

There is still concern that this new regime will deter the funding of legitimate defence or claims, with little incentive for lawyers to act on a CFA basis, without the prospect of a success fee. This is particularly acute for defendants who cannot rely on damages to pay a success fee. Views shared during the consultation process indicate that reform under LASPO that will see damages increased by 10% will not necessarily counter this effect (Civil Justice Council, 2013, p.38).

Additionally, the regime may be affected by the post-Leveson regulatory changes introduced by the Royal Charter and Crime and Courts Act 2013. In March 2013, before the finalisation of the Royal Charter and its accompanying legislative package, the Working Group on defamation costs felt unable to fully consult or take 'account of the potential consequences that might flow from the adoption of recommendations made in the Leveson Report, e.g., the establishment of an arbitration system' (Civil Justice Council, 2013, p.1).

The final and approved version of the Royal Charter and the Crime and Courts Act is designed to encourage parties to use arbitration in place of litigation where appropriate. If a regulator is recognised under the Royal Charter system, a new regime of costs and damages incentives (or penalties, as characterised by some critics: see Phillips, 2013) dependent on the expected membership of an approved regulator, could be activated. Within the government's scheme, which differs from Leveson LJ's proposals,³ 'relevant publishers', which includes the major newspaper groups, are incentivised through the Crime and Courts Act 2013 s34 (2) to join an approved regulator by receiving qualified immunity from exemplary damages in libel and privacy (see DCMS, 2013a; cf. Tomlinson, 2013a; b; Phillips, 2013); furthermore, in cases where the defendant is a 'relevant publisher', there is the possibility that costs will be awarded against either claimant or defendant if they do not use the arbitration system when appropriate, in the event of a win or a loss (Crime and Courts Act 2013, sec.40).

Concerns have been raised that the awarding of costs against a party even if they win is unfair, in terms of access to justice and freedom of expression (see Lawyers for Media Standards, 2013; Anthony, 2013). For 'non-relevant' publishers, the status quo remains, although it will depend on the nature of the approved regulator as to whether they could join it and access its arbitration service – and costs incentives – if they so desired.

³ Leveson did not recommend immunity from exemplary damages for members of an approved regulator, nor that exemplary damages could only be awarded against a particular type of publisher; rather, membership of a regulator would be a consideration for judges: 'Voluntary participation in a regulatory regime contained in or recognised by statute and good internal governance in relation to the sourcing of stories should be relevant to the decisions reached in relation to such damages' (Leveson, 2012d, p.1512, para.5.12).

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